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RECORD, CASE No. 14,794.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., 1320.

RICHARD S. TYLER, PLAINTIFF IN ERROR,

vs.

CASS COUNTY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA.

FILED AUGUST 10, 1891.

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1 STATE OF NORTH DAKOTA, *ss:*

In the Supreme Court.

I, R. D. Hoskins, clerk of the supreme court of the State of North Dakota, do hereby certify that in pursuance to the annexed writ of error in the case of Richard S. Tyler, plaintiff in error, *vs.* Cass County, defendant in error, that the annexed papers numbered from pages 1 to 62 are full, true, and correct copies of the original papers now on file in said court; that the following is a full, true, and correct copy of undertaking on appeal, and that they, together with the original writ of error and citation to the defendant in error, are hereby transmitted to the Supreme Court of the United States.

Witness my hand and official seal this 4th day of August, 1891.

[Seal Supreme Court, State of North Dakota.]

R. D. HOSKINS,
Clerk Supreme Court, State of North Dakota.

2 UNITED STATES OF AMERICA, *ss:*

Seal of the Supreme Court of the United States.

The President of the United States of America to the honorable the judges of the supreme court of the State of North Dakota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Cass County, appellant, and Richard S. Tyler, respondent, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of

3 or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said respondent, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within sixty days from the date hereof, in the said Supreme Court to be then and there held, that, the

record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the eleventh day of June, in the year of our Lord one thousand eight hundred and ninety-one.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

[Endorsed :] 113. Filed in the clerk's office, supreme court, State of North Dakota, Jul- 2, 1891. R. D. Hoskins, clerk.

4 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Cass County, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington within sixty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of North Dakota, wherein Richard S. Tyler is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this 11th day of June, in the year of our Lord one thousand eight hundred and ninety-one.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

5 [Endorsed :] Original. 113. Filed in the clerk's office, supreme court, State of North Dakota, Jul- 2, 1891. R. D. Hoskins, clerk.

On this 1st day of July, in the year of our Lord one thousand eight hundred and ninety-one, personally appeared before me, the subscriber, W. D. Hodgson, deputy United States marshal for the district of North Dakota, and makes oath that he delivered a true copy of the within citation to Charles E. Wilson, a member of the board of county commissioners for the within-named Cass county, at Fargo, N. D., July 1st, 1891.

W. D. HODGSON,
Deputy U. S. Marshal, Dist. North Dakota.

Sworn to and subscribed the 1st day of July, A. D. 1891.

[Seal C. E. Robbins, Notary Public, North Dakota.]

C. E. ROBBINS,
Notary Public.

6 To J. C. Gill, G. J. Kissner, R. E. Fleming, C. W. Redmon, and Ebin Young, as the board of county commissioners of Cass county, Dakota:

You will please take notice that I, Richard S. Tyler, appeal from the decision of the board of county commissioners of said county to the district court of the third judicial district of the Territory of Dakota in and for said county, which decision was upon a claim made by me upon said county for the refunding of two hundred and fifty-seven and $\frac{34}{100}$ (257.34) dollars paid by me to the county treasurer of said county at tax sale October 6th, 1885, for the taxes on the land described in my petition filed with said board of county commissioners, and which decision was made, given, and rendered by said board of county commissioners on the 26th day of March, 1886, and is recorded in the proceedings of said board in the words and figures following, to wit: "On motion, the petition of Richard S. Tyler for the refunding of 257.34 dollars for taxes paid the county treasurer at the sale October 6th, 1885, as described in said petition, be rejected, and that said bill be disallowed."

You will further please take notice that I appeal to said district court from the decision of said board of county commissioners, made, given, and rendered on the 26th day of March, 1886, upon my application by petition for the refunding of three hundred and forty-seven and $\frac{59}{100}$ (347.59) dollars for the taxes paid to the treasurer of said county at tax sale October 6th, 1885, as described in said petition, which said decision is recorded in the proceedings of said board of county commissioners in the words and figures following, to wit: "On motion, the petition of Richard S. Tyler for the refunding of 347.59 dollars for taxes paid the county treasurer at tax sale
7 October 6th, 1885, as described in said petition, be rejected, and that said bill be disallowed."

RICHARD S. TYLER.

(Endorsed:) To the board of county commissioners of Cass county. Notice of appeal. Due and personal service of a notice of appeal, of which the within is a copy, is hereby admitted at Fargo, D. T., this 15th day of April, 1886. G. J. Kissner, one of the board of county commissioners. Filed June 11, 1886. T. C. McConnell, clerk, by E. R. Wiswell, dep.

Copy of Proceedings of County Commissioners Cass County, D. T.

FRIDAY, *March 26th*, 1886.

Board met at 2 p. m.

Present: Messrs. Gill, Fleming, Young, and Redmon.

The following bill and communication was presented:

To the honorable board of commissioners of Cass county and the county treasurer of such county.

GENTLEMEN: At the annual tax sale held and made by said treasurer in October, 1885, of lands for non-payment of taxes claimed to have been duly and legally assessed and levied thereon in the year 1884

and in prior years I purchased the south half (S. ½) of the southwest quarter (S. W. ¼) and the south half (S. ½) of the southeast quarter (S. E. ¼) and the northeast quarter (N. E. ¼) of the southeast quarter (S. E. ¼) of section thirty-five (35), township one hundred and forty (140), range fifty-two (52), for the sum of two hundred and fifty-seven and $\frac{34}{100}$ ($257.34) dollars, which amount was at the time of such purchase the amount claimed by said treasurer and advertised
8 by him as the amount legally due and payable on account of such taxes, and such lands were then and there at public auction struck off to me for that sum, which amount I duly paid to the said treasurer, and which has since been retained by him.

It having since developed and been adjudicated by the highest tribunal that such land was not taxable at the time said pretended assessment and levy was made, and that by mistake no tax was due thereon at the time of such sale by said treasurer—

You will please take notice that pursuant to the statute in such case provided I hereby respectfully demand and request that said county and you, to whom this notice and demand is addressed, save me harmless on account of such purchase by paying me said sum of two hundred and fifty-seven and $\frac{34}{100}$ dollars, with interest thereon at the rate of 12 per cent. per annum from and since the time of such sale.

Yours, &c., RICHARD S. TYLER.

Dated March 25th, 1886.

STONE & NEWMAN, *Attorneys.*

Cass county and the treasurer thereof to Richard S. Tyler, Dr.

1886, March 25.	To amount of principal paid upon sale of the S. ½ of the S. W. ¼, S. ½ of the S. E. ¼, and the N. E. ¼ of the S. E. ¼ section 35, 140, 52, for taxes---- ------	$257 34

and interest thereon at 12 per cent. from and since Oct. 6th, 1885, being the day of sale thereof, as more fully appears by annexed statement and demand.

TERRITORY OF DAKOTA, *County of Cass,* } *ss:*

9 Richard S. Tyler, being first duly sworn, says that he is the claimant and person named in the account, statement, and demand annexed; that said account is just, true, and correct, and the full amount thereof is owing the deponent, and that no part thereof has been paid.

RICHARD S. TYLER.

Subscribed and sworn to before me this 25th day of March, 1886.

D. A. LINDSEY,

[SEAL.] *Notary Public, Cass County, D. T.*

At this time said R. S. Tyler, through his attorneys (Messrs. Stone & Newman), offered to surrender and cancel the county treasurer's

certificate of tax sale, number 381, of the lands mentioned in the above petition, dated October 14th, 1885, issued for the sum of $257.34.

On motion, the above petition and bill of Richard S. Tyler was referred to the district attorney, who reported as follows:

FARGO, D. T., *March 26th*, 1886.

I advise the board of county commissioners to reject the within bill and refuse to grant the relief therein demanded.

CHAS. A. POLLOCK,
District Attorney, Cass County, D. T.

On motion, the petition of Richard S. Tyler for the refunding of $257.34 for taxes paid to the county treasurer at tax sale Oct. 6th, 1885, as described in said petition, was rejected, and that said bill be disallowed.

Richard S. Tyler presented an additional petition, asking that the county treasurer be instructed to refund the taxes collected at tax sale of October 6th, 1885, on the land below described, stating, among other things, as a ground therefore that the lands described were not taxable:

E. ½ of N. E. ¼ sec. 27, 141, 49, dated Oct. 6, 1885	$9 61
N. ½ of N. E. ¼ and N. E. ¼ of N. W. ¼ sec. 11, 137, 50, dated Oct. 6, 1885	16 11
N. ½ of S. W. ¼ and S. W. ¼ of N. W. ¼ sec. 33, 137, 50, dated Oct. 6, 1885	20 41
W. ½ of sec. 25, 138, 50, less the undivided one-half of N. W. ¼ and W. ½ of S. W. ¼ thereof, Oct. 6, 1885, $58.14, less $22.11	36 03
S. ½ of N. ½ of S. E. ¼ of N. E. ¼ sec. 35, 140, 52, dated Oct. 6, 1885	37 54
S. E. ¼ of sec. 7, 140, 55, dated Oct. 7th, 1885	39 99
Section 29, 143, 55, dated Oct. 7th, 1885	123 89
Section 31, 141, 54, dated Oct. 7, 1885	64 01

and interest thereon at the rate of 12 per cent. per annum from and since the dates above given, each being respectively the days of sale thereof.

On motion, the above petition of Richard S. Tyler was referred to the district attorney, who reported as follows:

FARGO, D. T., *March* 26, 1886.

I advise the board of county commissioners to reject the within bill and refuse to grant the relief therein demanded.

CHAS. A. POLLCK,
District Attorney, Cass County, D. T.

On motion, the petition of Richard S. Tyler, for the refunding of $347.59 for taxes paid to the county treasurer at tax sale October 6th, 1885, as described in said petition, was rejected, and that said bill be disallowed.

11 TERRITORY OF DAKOTA, } ss:
County of Cass, }

I, E. F. Johnson, auditor within and for said county, do hereby certify that the above transcript is a true, correct, and complete copy of the records of the action of the board of county commissioners of said county relative to the petition of Richard S. Tyler for the refunding of moneys paid to county treasurer of said county at tax sale of 1885 as the same appears on pages 384, 385, 386, and 387 of Book "B" of the records of said board.

Witness my hand and the seal of Cass county, D. T., this 15th day of June, A. D. 1886.

E. F. JOHNSON,
[SEAL.] *County Auditor, Cass County, D. T.*

(Endorsed:) Filed June 17, 1886. T. C. McConnell, clerk, by E. R. Wiswell, dep.

TERRITORY OF DAKOTA, }
County of Cass. }

District Court, Third Judicial District.

RICHARD S. TYLER }
against } Stipulation of Facts.
CASS COUNTY. }

It is stipulated by and between the parties to the above-entitled action that the following is a true and correct statement of the facts in said action upon which plaintiff bases his claim to recover therein, to wit:

I.

That the Northern Pacific Railroad Company is a corporation duly organized and existing under that certain act of Congress approved July 2nd, 1864, entitled "An act granting land to aid in the construction of a railroad and telegraph line by the northern route," and under those certain subsequent acts and resolutions of Congress relating to the same subject-matter, each of which acts is hereby made a part hereof.

12 II.

That the lands hereinafter described and each and every parcel thereof were embraced within the provisions of said act, and were by the terms and provisions thereof granted to the said Northern Pacific Railroad Company under said terms and provisions, and since the date of said grant and before the assessment and levy of the taxes thereon, as below described, all of said land had been transferred to third parties, either by contract or warranty deed, and are now in possession of such third parties by virtue of such contracts and deeds.

III.

That under and in pursuance of said several acts and resolutions

of Congress said Northern Pacific Railroad Company had prior to the year 1884 completed and caused to be completed and put in operation a continuous line of railroad and telegraph extending from the waters of Lake Superior, at Duluth, Minnesota, westerly across the said State and across the Territory of Dakota to and beyond the westerly limit of said Territory, and of the character and materials specified in said acts, and everything had been done by said railroad company to acquire a complete and perfect title to the lands in controversy in this action and hereinafter described, except as to the payment of the costs of survey, etc., required in the act of Congress of July 15th, 1870, all of which part of said railroad within the Territory of Dakota had been located and completed since July 15th, 1870. The Government of the United States since the passage of said act of Congress of July 15th, 1870, has caused said lands hereinafter described to be surveyed at its own expense, no part of which expense or costs of surveying was repaid to it by said railroad company until after such sale and about March 16th, 1886. The patents for said lands hereinafter described or any of them had not on the 6th day of October, 1885, been issued
13 to said railroad company or to any persons for said company, and the Government of the United States refused to issue said patents until the payment for surveying and selecting said lands as above mentioned and required by said act of July 15th, 1870.

IV.

That the lands hereinafter mentioned and described were at the time said acts were passed and the said railroad located through the said Territory of Dakota a part of the public domain of the United States and not any part of right of way mentioned in said act, and had never been sold, reserved, granted, or otherwise appropriated except as above mentioned, and were free of pre-emption and other rights, and were situated within the distance of forty miles of the line of the railroad of the Northern Pacific Railroad Company; that in the year 1884 and prior thereto the officers of said county of Cass authorized by the laws of this Territory to assess pro-erty therein for the purposes of taxation and to levy taxes thereon assessed and levied taxes upon said land and each parcel thereof for that and prior years, all of which remained unpaid on the 6th day of October, 1885.

V.

That prior to said 6th day of October, 1885, A. H. Burke, who then was and now is county treasurer of said Cass county, did advertise and give public notice that on a certain day and place, to wit, on the first Monday in October, 1885, at the office of the said treasurer, in the city of Fargo, in said county of Cass, he would sell the said lands according to law for the non-payment of said taxes and for the collection of the same; that on said 6th day of October, 1885, at said office, the said A. H. Burke, as county treasurer of said Cass county, offered said lands and each separate parcel

thereof for sale at public auction to the highest bidder for the
14 non-payment of the said taxes and for the collection of the same,
and the said lands and each separate parcel thereof were then and there at said sale publicly struck off and sold to this plaintiff, he being the highest bidder therefor, for the sums respectively hereinafter mentioned, set opposite to each respective description of said lands.

That said A. H. Burke, as treasurer of said Cass county, did thereafter execute and deliver to this plaintiff a certificate of sale of said lands in form as provided by law to be issued upon the sale of lands for the non-payment of taxes, and this plaintiff did thereupon pay the said Burke, as treasurer of said Cass county, each and all the sums hereinafter mentioned as the purchase price of said parcels of land respectively, which said sums amounted in the aggregate to five hundred and one dollars and sixty-eight cents.

That hereafter and prior to the commencement of this action and prior to the presentation of his petition therein to the board of county commissioners of said Cass county for repayment of said sums this plaintiff tendered to said Burke, as treasurer of said Cass county, an offer to surrender to him, as such treasurer, upon repayment of said sums as aforesaid, each and all of said certificates of sale; that the several parcels of land as aforesaid sold by said Burke, as said treasurer, to this plaintiff and hereinbefore mentioned are described as follows, to wit:

The south half of the southwest quarter, south half of southeast quarter, and northeast quarter of southeast quarter of section thirty-five, township one hundred and forty, range fifty-two	$257 34
The north half of southwest quarter and southwest quarter of northwest quarter of section thirty-three, township one hundred and thirty-seven, range fifty	20 41
West half of section twenty-five, township one hundred and thirty-eight, range fifty, less the undivided one-
15 half of the northwest quarter and the west half of the southwest quarter thereof	36 03
All of section twenty-nine, township one hundred and forty-three, range fifty-five	123 89
All of section thirty-one, township one hundred and forty-one, range fifty-four	64 01

And that the sums set opposite *of* each of said descriptions respectively is the sum for which such description was so as aforesaid sold to this plaintiff.

It is further agreed that upon the submission of this stipulation to said court judgment in said action shall be rendered thereon without other or further proof.

August 4, 1886.

STONE & NEWMAN,
Plaintiff's Attorneys.
CHAS. A. POLLOCK,
Defendant's Attorney.

(Endorsed:) District court, county of Cass. R. S. Tyler *vs.* Cass county. Stipulation of facts. Filed December 30th, 1886. T. C. McConnell, clerk, by E. R. Wiswell, dep.

TERRITORY OF DAKOTA, } *ss:*
County of Cass, }

In District Court, Third Judicial District.

RICHARD S. TYLER *vs.* CASS COUNTY. } Notice of Intention to Move for a New Trial.

Please take notice that the defendant intends to move the court to vacate and set aside the decision of the court rendered in the above cause on the 7th day of December, 1886, and to grant
16 a new trial of said cause upon the following grounds, to wit:

Insufficiency of evidence to justify the decision of the court. Said motion will be made upon a statement of the case hereafter to be prepared and upon all the papers now upon file, as well as the minutes of the court made in said cause.

Yours respectfully, CHAS. A. POLLOCK,
Attorney for Defendant.

Fargo, D. T., December 10th, 1886.
To Messrs. Stone & Newman, attorneys for plaintiff.

(Endorsed:) Territory of Dakota, county of Cass. Richard S. Tyler *vs.* Cass Co. Notice of intention to move for a new trial.

Due and personal service of the within notice of intention to move for a new trial upon us is hereby admitted by copy at Fargo, D. T., this 10th day of December, 1886.

STONE & NEWMAN,
Attorneys for Plaintiff.

TERRITORY OF DAKOTA, }
County of Cass. }

In District Court, Third Judicial District.

R. S. TYLER *vs.* CASS COUNTY. }

Statement of the Case on Motion for a New Trial.

This action arises upon an appeal from the decision of the board of county commissioners of Cass county, D. T., in refusing to refund plaintiff the sum of five hundred and one dollars and sixty-
17 eight cents and twelve per cent. interest thereon from and after October 6th, 1885; which said sum of five hundred and one dollars and sixty-eight cents was paid to the treasurer of said county

October 6th, 1885, by said plaintiff as a tax-sale purchaser for the lands hereinafter described, for certain taxes then claimed and represented to be due thereon.

The cause being regularly on the calendar of the June term of said court and coming on at said term to be heard, plaintiff appeared by Messrs. Stone & Newman and defendant by Chas. A. Pollock, Esq. A trial by jury was formally waived by both parties in open court and the following agreed statement of facts *were* presented and agreed upon as containing all the question- in issue between the respective parties; and the said action was at the same time heard and decided upon the return of the county auditor of said Cass county, upon said appeal, and upon the said agreed statement of facts, which was as follows:

TERRITORY OF DAKOTA, }
County of Cass. }

District Court, Third Judicial District.

RICHARD S. TYLER *against* CASS COUNTY. } Stipulation of Facts.

It is stipulated by and between the parties to the above-entitled action that the following is a true and correct statement of the facts in said action upon which plaintiff bases his claim to recover therein, to wit:

I.

That the Northern Pacific Railroad Company is a corporation duly organized and existing under that certain act of Congress, approved July 2nd, 1864, entitled "An act granting land to aid in the construction of a railroad and telegraph line by the northern route," and under those certain subsequent acts and resolutions of Congress relating to the same subject-matter, each of which acts is hereby made a part hereof.

18 II.

That the lands hereinafter described and each and every parcel thereof were embraced within the provisions of said act and were by the terms and provisions thereof granted to the said Northern Pacific Railroad Company under said terms and provisions, and since the date of said grant and before the assessment and levy of the taxes thereon, as below described, all of said land had been transferred to third parties either by contract or warranty deed and are now in possession of such third parties by virtue of such contracts and deeds.

III.

That under and in pursuance of said several acts and resolutions of Congress said Northern Pacific Railroad Company had, prior to the year 1884, completed and caused to be completed and put in operation a continuous line of railroad and telegraph extending

from the waters of Lake Superior, at Duluth, Minnesota, westerly across the said State and across the Territory of Dakota to and beyond the westerly limit of said Territory, and of the character and materials specified in said acts, and everything had been done by said railroad company to acquire a complete and perfect title to the lands in controversy in this action and hereinafter described, except as to the payment of the costs of survey, etc., required in the act of Congress of July 15th, 1870, all of which part of said railroad within the Territory of Dakota had been located and completed since July 15th, 1870. The Government of the United States since the passage of said act of Congress of July 15th, 1870, has caused said lands hereinafter described to be surveyed at its own expense, no part of which expense or costs of surveying was repaid to it by said railroad company until after after such sale and about March 16th, 1886. The patents for said lands hereinafter described or any of them had not on the 6th day of October, 1885, been issued to said railroad company or to any persons for said company, and the Government of the United States refused to issue said patent until the payment for surveying and selecting said lands as above mentioned and required by said act of July 15th, 1870.

IV.

That the lands hereinafter mentioned and described were at the time said acts were passed and the said railroad located through the said Territory of Dakota a part of the public domain of the United States and not any part of right of way mentioned in said act, and had never been sold, reserved, granted, or otherwise appropriated except as above mentioned, and were free of pre-emption and other rights and were situated within the distance of forty miles of the line of the railroad of the Northern Pacific Railroad Company; that in the year 1884 and prior thereto the officers of the said county of Cass, authorized by the laws of this Territory to assess property therein for the purposes of taxation and to levy taxes thereon, assessed and levied taxes upon said land and each parcel thereof for that and prior years, all of which remained unpaid on the 6th day of October, 1885.

V.

That prior to said 6th day of October, 1885, A. H. Burke, who then was and now is county treasurer of said Cass county, did advertise and give public notice that on a certain day and place, to wit, on the first Monday in October, 1885, at the office of the said treasurer, in the city of Fargo, in said county of Cass, he would sell the said lands according to law for the non-payment of said taxes and for the collection of the same; that on said 6th day of October, 1885, at said office, the said A. H. Burke, as county treasurer of said Cass county, offered said lands and each separate parcel thereof for sale at public auction to the highest bidder for the non-payment of the said taxes and for the collection of the same, and the said lands and each separate parcel thereof were then

and there at said sale publicly struck off and sold to this plaintiff, he being the highest bidder therefor, for the sums respectively hereinafter mentioned, set opposite to each respective description of said land.

That said A. H. Burke, as treasurer of said Cass county, did thereafter execute and deliver to this plaintiff a certificate of sale of said lands in form as provided by law to be issued upon the sale of lands for the non-payment of taxes, and this plaintiff did thereupon pay the said Burke, as treasurer of said Cass county, each and all the sums hereinafter mentioned as the purchase price of said parcels of land respectively; which said sums amounted in the aggregate to five hundred and one dollars and sixty-eight cents.

That hereafter and prior to the commencement of this action and prior to the presentation of his petition therein to the board of county commissioners of said Cass county for repayment of said sums this plaintiff tendered to said Burke, as treasurer of said Cass county, an offer to surrender to him, as such treasurer, upon repayment of said sums as aforesaid, each and all of said certificates of sale; that the several parcels of land as aforesaid sold by said Burke, as said treasurer, to this plaintiff and hereinbefore mentioned are described as follows, to wit:

The south half of the southwest quarter, south half of southeast quarter, and northeast quarter of southeast quarter of section thirty-five, township one hundred and forty, range fifty-two	$257 34
The north half of southwest quarter and southwest quarter of northwest quarter of section thirty-three, township one hundred and thirty-seven, range fifty	20 41
West half of section twenty-five, township one hundred and thirty-eight, range fifty, less the undivided one-21 half of the northwest quarter, and the west half of the southwest quarter thereof	36 03
All of section twenty-nine, township one hundred and forty-three, range fifty-five	123 89
All of section thirty-one, township one hundred and forty-one, range fifty-four	64 01

and that the sums set opposite of each of said descriptions respectively is the sum for which such description was so as aforesaid sold to this plaintiff.

It is further agreed that upon the submission of this stipulation to said court judgment in said action shall be rendered thereon without other or further proof.

August 4, 1886.

STONE & NEWMAN,
Plaintiff's Attorneys.
CHAS. A. POLLOCK,
Defendant's Attorney.

Thereupon the court heard the arguments of the respective counsel and took the matter under advisement.

That on the 7th day of December, 1886, said court rendered his decision in the premises in the following language:

Upon the agreed statement of facts made and filed in this action I find the following conclusions of law:

I.

That at the time of the sale of the lands mentioned and described in said statement by the treasurer of said Cass county for delinquent taxes no tax of any description was due upon any portion of said lands.

II.

That said lands and each and every parcel thereof *was* sold, as set forth in said statement of facts, by the mistake and wrong-
22 ful act of said Burke, the then treasurer of said Cass county.

I therefore enter judgment in favor of the plaintiff and against said Cass county for the amount of $501.68, with interest thereon from and after the 6th day of October, 1885.

WM. B. McCONNELL,
Judge of the District Court.

To which decision defendant, by counsel, duly excepted as follows:

TERRITORY OF DAKOTA, }
County of Cass. }

In District Court, Third Judicial District.

RICHARD S. TYLER
vs.
CASS COUNTY. } Exceptions to Decision.

And now comes the defendant, by its counsel, and excepts to the decision of the court returned for the plaintiff herein, and defendant hereby alleges and specifies the following particulars in which the evidence appearing in the agreed statement of facts and introduced at the trial of this action is insufficient to sustain said decision:

I.

The evidence is insufficient to warrant the conclusion of law, numbered I, that the lands in question were not subject to and liable for taxation for the years mentioned in said agreed statement of facts (reference being made to entire "agreed statement of facts"), and that there were no taxes due for said years, but, upon the contrary, said evidence shows that the taxes so mentioned were due and properly a lien on the said lands.

II.

The evidence is insufficient to warrant the conclusion of law, numbered II, that there was either a mistake or wrongful act of the treasurer of Cass county, D. T., in selling the land in question (reference being made to the entire "agreed statement of facts").

III.

It being admitted that at the time of the assessment and
23 levy of the taxes on the lands in question the same did not belong to the Northern Pacific Railroad Company, but were in the hands of third persons by right of purchase, the remaining evidence was further insufficient to warrant the conclusion of law, numbered I, that as such and in such conditions there were no taxes due and they were not subject to and liable for the taxes referred to (reference being made to entire "agreed statement of facts").

The foregoing exceptions to the decision of the court in the above-entitled action are severally examined and allowed, and the same are ordered to be annexed to and incorporated with the statement of the case.

Fargo, D. T., December 14th, 1886.

WM. B. McCONNELL,
Judge of the Dist. Court.

(Endorsed:) Richard S. Tyler *vs.* The Board of County Commissioners of Cass County, D. T. Exceptions to decision. Chas. A. Pollock, att'y for def't.

The above and foregoing statement of the case herein contains the statement of the case as proposed by the defendant and agreed to by counsel for plaintiff.

And I now hereby settle and allow the same in presence of counsel for both parties, without objection, and certify that the same contains a true and correct statement of all the evidence adduced at the trial of this action and which was at said trial stipulated and agreed upon as containing and presenting all the facts at issue between the parties.

Also defendant's exceptions to the decision, together with
24 all other proceedings had or taken at the trial of said case.

It is hereby ordered that the same be incorporated with and be made a part of the judgment-roll.

Dated Fargo, Dakota, December 14th, 1886.

WM. B. McCONNELL,
Judge of the District Court.

TERRITORY OF DAKOTA, }
County of Cass. }

In District Court, 3rd Judicial Dist.

RICHARD S. TYLER
vs.
CASS COUNTY. } Motion for a New Trial.

To Messrs. Stone & Newman, attorneys for plaintiff:

Please take notice that defendant herein will, at the court-house, in the city of Fargo, Cass Co., D. T., at the hour of ten o'clock a. m., December 14th, 1886, or as soon thereafter as counsel can be heard, move the court or the judge thereof to grant a new trial in the above-

entitled action, and specifies herein the following grounds upon which said motion will be based, viz:

That the evidence appearing at the trial is insufficinent to sustain the decision of said court.

And states the following particulars wherein the same was insufficient.

I.

The evidence was insufficient to warrant the conclusion of law, number 1, that the lands in question were not subject to and liable for taxation for the years mentioned in said agreed statement of facts, and that there were no taxes due on the same, but, upon the contrary, said evidence shows that the taxes so mentioned were due and properly a lien on said land.

II.

The evidence is insufficinet to warrant the conclusion of law, number II, that there was either a mistake or wrongful act of the treasurer of Cass county, D. T., in selling the lands in question.

III.

It being admitted that at the time of the assessment and levy of the taxes on the lands in question the same did not belong to the Northern Pacific Railroad Company, but were in the hands of third persons by right of purchase, the remaining evidence was further insufficinet to warrant the conclusion of law, number I, that as such and in such condition there were no taxes due, and they were not subject to and liable for the taxes referred to.

The said motion will be based upon the pleadings, the statement of the case, and all the records so far made in said case, together with all orders of the court or the judge thereof made herein.

Yours respectfully, CHAS. A. POLLOCK,
Attorney for Defendant.

(Endorsed:) Territory of Dakota, county of Cass. R. S. Tyler *vs.* The Board of Co. Com. Cass Co., D. T. Motion for new trial.

Due and personal service of the within notice of motion upon us by copy is hereby admitted this 14th day of December, 1886, at Fargo, D. T., all questions as to time and manner of service being waived.

STONE & NEWMAN,
Att'ys for Plaintiff.

TERRITORY OF DAKOTA, }
County of Cass. }

In District Court, Third Judicial Dist.

At a regular term of the above-named court held in the court-house, in the city of Fargo, Dakota Territory, on the 14th day of

December, 1886, it being the regular December term of said
26 court.

Present: Hon. Wm. B. McConnell, judge.

RICHARD S. TYLER
vs.
CASS COUNTY.

The above-entitled cause came before me on due notice this 14th day of December, 1886, on motion of the defendant to set aside the decision of the court heretofcre made and for a new trial of this cause, Messrs. Stone & Newman appearing for plaintiff and Chas. A. Pollock appearing for defendant.

And, having heard the respective counsel and duly considered said motion, it is ordered that the said motion be, and the same is hereby, denied.

Dated Fargo, D. T., Dec. 14, 1886.

By the court:

WM. B. McCONNELL, *Judge.*

To which order the defendant, by its counsel, excepted as follows:

Defendant excepts to the above order denying defendant's motion to set aside the decision of the court herein and for a new trial of this cause, and at the request of defendant's counsel said exception, together with said order and the notice of intention to move for a new trial, also the motion for a new trial herein, and all and singular, are hereby brought upon and made a part of the record and judgment-roll in this case.

Dated Fargo, D. T., Dec. 14th, 1886.

By the court:

WM. B. McCONNELL, *Judge.*

At a term of the district court of the third judicial district of the Territory of Dakota held in and for the county of Cass, at the courthouse, in the city of Fargo, on the 30th day of December, 1886, being the regular December term of said court.

27 Hon. Wm. B. McConnell, judge presiding.

RICHARD S. TYLER
vs.
THE COUNTY OF CASS.

This cause having come on for trial upon an appeal by plaintiff herein from the decision of the board of county commissioners of Cass county upon the matter properly before said board, and having been duly tried and submitted to this court at the June term thereof upon a written stipulation of facts and upon argument of counsel, Stone & Newman appearing for plaintiff and Charles A. Pollock, Esq., district attorney, appearing for defendant, after due consideration it is ordered and adjudged that the plaintiff have and recover of and from the defendant herein the sum of five hundred seventy-five dollars and twenty-three cents, together with his costs

and disbursements of this action, to be taxed according to law by the clerk of this court, amounting to twenty-five and $\frac{95}{100}$ dollars, amounting in the whole to the sum of six hundred one (601) dollars and sixty-eight cents.

WM. B. McCONNELL, *Judge.*

Attest: T. C. McCONNELL, *Clerk,*
[SEAL.] By E. R. WISWELL, *Dep.*

TERRITORY OF DAKOTA, }
County of Cass. }

District Court, Third Judicial District.

RICHARD S. TYLER
vs.
THE COUNTY OF CASS. } Statement of Judgment.

Amount of claim	$501 68
Interest at 12 per cent. from ——	74 05
Costs before notice of trial	$10 00
Costs after notice and before trial	3 00
Trial fee	5 00
28 Auditor's fee	
Clerk's fees	7 95
Total	$25 95

The costs in the above-entitled action are hereby stipulated at the sum of twenty-five dollars and ninety-five cents, and the clerk of this court is authorized to tax the same at said amount.

STONE & NEWMAN,
Plaintiff's Attorneys.
CHAS. A. POLLOCK,
Defendant's Attorney.

The costs in the above-entitled action are hereby taxed and allowed at the sum of twenty-five dollars and ninety-five cents.

T. C. McCONNELL, *Clerk,*
By E. R. WISWELL, *Dep.*

Filed Dec. 30, 1886, at 4.30 o'clock p. m.

T. C. McCONNELL, *Clerk,*
By E. R. WISWELL, *Dep.*

TERRITORY OF DAKOTA, }
County of Cass. }

In District Court, Third Judicial District.

RICHARD S. TYLER }
vs. }
CASS COUNTY. }

TERRITORY OF DAKOTA, }
Third Judicial District, } *ss:*

I, Wm. B. McConnell, associate justice of the supreme court of the Territory and sole presiding judge of the third judicial district, which district includes the county of Cass, do hereby certify that the following-named papers, to wit:

1. Notice of appeal from board of county commissioners;
2. Copy of proceedings of board of county commissioners;
3. Stipulation of facts;
29 4. Notice of intention to move for a new trial;
5. Statement of case, which includes—
   a. Statement;
   b. Stipulation of facts;
   c. Conclusions of law;
   d. Order for judgment;
   e. Exceptions to decision;
   f. Order of court and exceptions;
6. Motion for a new trial;
7. Order overruling motion for a new trial and exceptions;
8. Judgment;

are contained in and constitute the judgment-roll and the whole thereof in the above-entitled action.

Dated January 27th, A. D. 1887.

WM. B. McCONNELL, *Judge.*

TERRITORY OF DAKOTA, }
County of Cass. }

In District Court, Third Judicial District.

RICHARD S. TYLER }
vs. } Notice of Appeal.
CASS COUNTY. }

Please take notice—

That the defendant in the above action hereby appeals to the supreme court of this Territory from the judgment therein made and entered in the said district court on the 30th day of December, 1886, in favor of the plaintiff in said action and against said defendant and from the whole thereof.

Defendant also appeals from the order made by said court on the 14th day of December, 1886, in said cause denying defendant's

motion for a new trial herein, and asks that the same may be reviewed.

Fargo, D. T., December 30th, 1886.

30 CHARLES A. POLLOCK,
Attorney for Def't.

To the clerk of the district court, Cass county, D. T., and Stone & Newman, attorneys for plaintiff.

(Endorsed:) Richard S. Tyler *vs.* Cass county. Due and personal service of the within notice of appeal is admitted upon us by copy this 30th day of December, 1886. T. C. McConnell, clerk district court, Cass county, D. T. Stone & Newman, attorneys for plaintiff. Filed this 30th day of December, 1886. T. C. McConnell, clerk.

Assignment of Errors.

In the Supreme Court of the Territory of Dakota.

RICHARD S. TYLER, Plaintiff and Respondent,
vs.
CASS COUNTY, Defendant and Appellant.

The appellant herein says there is manifest error on the face of the record in this:

I.

The court erred in deciding that the lands mentioned and described in the agreed statement of facts were not subject to and liable for the taxes therein described, and that there were no taxes due thereon.

II.

The court erred in deciding that lands were sold either by the mistake or wrongful act of the treasurer of Cass county.

31 III.

The court erred in overruling defendant's motion for a new trial, said motion being based upon the grounds in said motion specified.

CHAS. A. POLLOCK,
Attorney for Defendant.

TERRITORY OF DAKOTA, } ss:
County of Cass,

Third Judicial District.

I, T. C. McConnell, clerk of the district court within and for the said county of Cass, in the third judicial district of the Territory of Dakota, do hereby certify that the above and foregoing is a full, true, correct, and complete transcript and copy of the notice of appeal and proof of service thereof, of the judgment-roll, and of the certificate of the judge in the above-entitled action, wherein Richard

S. Tyler is plaintiff and Cass County is defendant, as the same now remains of record in the said court.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 27th day of January, A. D. 1887.

[SEAL.] T. C. McCONNELL, *Clerk.*

The above and foregoing papers, numbered from pages one to twenty-six, inclusive, were filed in the supreme court of the State of North Dakota on the 14th day of December, A. D. 1889.

32 STATE OF NORTH DAKOTA, *ss:*

In the Supreme Court, October Term, A. D. 1890.

RICHARD S. TYLER, Plaintiff and Respondent,
vs.
CASS COUNTY, Defendant and Appellant.

Appeal from the district court of Cass county.

This action coming on to be heard at the October, A. D. 1890, term of this court, at the supreme court room, in the city of Grand Forks, State of North Dakota—present, Guy C. H. Corliss, chief justice, and J. M. Bartholomew and Alfred Wallin, associate justices—and the appeal herein having been argued by counsel for the appellant and by Seth Newman, Esq., for respondent, and the court having advised thereon, it is now here considered, ordered, and adjudged that the judgment of the said district court within and for said Cass county, appealed from herein, be, and the same is hereby, reversed, and the district court is directed to dismiss the case.

And it is further ordered that this cause be, and it is hereby, remanded to the district court for further proceedings, according to law and the judgment of this court.

And it is further considered and adjudged that appellant have and recover of the respondent costs and disbursements in the district court and on this appeal expended, to be taxed and allowed in the district court.

Dated Nov. 29th, 1890.

By the court:

GUY C. H. CORLISS,
Chief Justice.

Attest:

[SEAL.] R. D. HOSKINS, *Clerk.*

33 (Endorsed:) File No. 1. In supreme court, State of North Dakota, October term, 1890. Richard S. Tyler, plaintiff and res., *vs.* Cass County, defendant and app. Filed in open court this 29th day of Nov., 1890. R. D. Hoskins, clerk. Remittitur sent down Mar. 5, 1891. Recorded in Judgment Book B, page 42. R. D. Hoskins, clerk.

Opinion of the Court.

In the Supreme Court, October Term, 1890.

RICHARD S. TYLER, Plaintiff and Respondent,
vs.
CASS COUNTY, Defendant and Appellant.

The defendant county, through its treasurer, sold certain lands for delinquent taxes at the annual tax sale in October, 1885. The lands so sold were a part of the original grant by the General Government to the Northern Pacific Railroad Co. The lands were surveyed at the expense of the United States and earned by said company after the passage of the act of Congress of July 15, 1870, pertaining to survey fees, and no part of such survey fees had been repaid to the United States at the time of such sale. Prior to the assessment and levy of the taxes for which said lands were sold the railroad company had disposed of the lands and conveyed them to third parties by deeds and contracts, and such third parties were in possession. Said lands were regularly assessed and all the proceedings leading up to the tax sale were regular. Plaintiff bought the lands at such tax sale and brings this action to recover
34 the purchase-money so paid. Held, that such lands were not taxable at the time of such assessment, because the United States held the fee title to said lands and had a lien thereon for the survey fees (Northern Pacific Railroad Co. *vs.* Rockne, 115 U. S., 600); but that since land was a subject of taxation in Dakota Territory, *prima facie* these lands were taxable. Taxation was the rule; freedom from taxation the exception.

2. Held further that, the assessor being a judicial officer, where property is exempted from taxation by class and not by specific description, he has full jurisdiction and it is his duty to decide in each instance whether or not a particular piece of property falls within any of the exempted classes, and in this respect the source of the law that establishes the exemption is immaterial.

3. Held further that an erroneous decision of an assessor in the matter of exemptions does not deprive the tax proceedings of jurisdiction, but until such erroneous decision is modified or set aside by the proper tribunal all officers with subsequent functions may safely act thereon.

4. Upon a right of recovery at common law there is nothing in this case to relieve plaintiff from the rule of *caveat emptor* as announced by this court in the case of Budge *vs.* City of Grand Forks, decided at this term.

5. Under the law in force when such sale was made the treasurer, in the matter of the collection of the taxes, was purely a ministerial officer, and when he received the duplicate tax-list with the warrant of the county commissioners attached, if such process was fair on its face and contained nothing that would apprise the treasurer of any defects or infirmities, and in a case where it does not appear
35 that the treasurer had any knowledge of any defects or in-

firmities, such treasurer was fully protected from personal liability in collecting the taxes upon all property contained in his said list so long as he acted strictly within the statute. The law furnished his authority for selling property for delinquent taxes; the warrant with the tax-list attached furnished him the subjects upon which to exercise such authority.

6. The statute (Compiled Laws, section 1621) which required the treasurer to "sell all lands liable for taxes of any description for the preceding year or years" meant all lands liable for taxes, as shown by the process, in his hands. He could not refuse to sell lands on his list nor could he sell lands not on his list.

7. Section 1629, Compiled Laws, then in force, read as follows: "When by mistake or wrongful act of the treasurer land has been sold on which no tax was due at the time the county is to save the purchaser harmless by paying him the amount of the principal and interest at the rate of twelve per cent. per annum from the date of sale, and the treasurer and his sureties shall be liable for the amount to the county on his bond or the purchaser may recover the same directly from the treasurer." Held, that the sale of the lands in this case was neither the mistake or the wrongful act of the treasurer within the meaning of said section, and that plaintiff has no right of action under said section.

8. Section 84 of chapter 132, Laws of North Dakota for 1890, has no application to a sale of lands made before the enactment of said chapter.

(Syllabus by the court.)

Appeal from a judgment for plaintiff entered in the district court for Cass county, Hon. Wm. B. McConnell, judge.

Stone & Newman, for plaintiff and respondent: S. B. Bartlett, A. C. Davis, J. A. McEldowny, and Jesse A. Frye, for defendant and appellant.

36 BARTHOLOMEW, *J.*:

This action was commenced by the presentation by plaintiff of a claim to the board of county commissioners of the defendant county, by which plaintiff sought to recover certain money paid by him as the purchase price of tax-sale certificates on certain real estate sold by defendant's treasurer for delinquent taxes at the annual tax sale on October 6th, 1885. The board of county commissioners refused to allow the claim and plaintiff appealed under the statute to the district court. In that court the case was tried upon an agreed statement of facts without a jury. From this statement it appears that the real estate in question was a part of the original grant by the United States to the Northern Pacific Railroad Company; that said company had, prior to the levy and sale hereinafter mentioned, disposed of said lands to private parties by deeds and contracts, and such parties were in possession; that no patents had issued for said land; that the railroad company earned said lands after the passage of the act of Congress of date July 15th, 1870, pertaining to survey fees; that said lands were

originally surveyed at the expense of the United States Government and after the passage of said act of Congress, and no part of the cost and expenses of said survey had at the time of said tax sale been repaid by said railroad company to the United States, as provided by the last-mentioned act of Congress; that in 1884 and prior thereto the taxing officers of the different county proceeded to assess said lands and levy taxes thereon, all of which remained unpaid on October 6th, 1885, and on said date the treasurer of said county proceeded to sell said lands for said delinquent taxes and the plaintiff purchased the same, and it was to recover the purchase-money so paid that this action was brought.

No question is made as to the regularity of the sale or the tax proceedings leading thereto. The statement of facts, as was
37 intended, brings the lands clearly within the conditions existing in Railroad Co. *v.* Rockne, 115 U. S., 600, 6 Sup. C't Rep., 201. Under the law, as settled by that case, the lands in question were not taxable at the time the taxes were assessed and levied by reason of the non-payment by the railroad company of the survey fees, for which the General Government had a lien upon the lands. The lands not being taxable, of course nothing passed by the sale. Plaintiff claims to recover his purchase-money, with 12 per cent. per annum interest, under a statute to be hereinafter considered, or the purchase price, with legal interest, as for money had and received. The liability of a taxing municipality to refund money paid for void tax-sale certificates in the absence of a regulating statute has very recently received full consideration by this court, and such liability was denied. See Budge *v.* City of Grand Forks, 47 N. W. Rep., 390 (decided at this term). As the briefs of counsel in this case were in the hands of the court and received careful consideration before the decision was reached in the case against the city of Grand Forks, it will not be necessary for us to say anything upon this point in addition to what we then said except to note one distinction which is strenuously insisted upon by counsel. In the former case the invalidity of the tax-sale certificates arose from certain irregularities in the proceedings of the taxing officials. In this case the invalidity arose from the entire absence of power in the sovereignty under whose authority this tax sale was made to impose any tax whatever upon the lands which plaintiff purchased at said sale. In Railroad Co. *v.* Rockne, *supra*, it was held that when, after the passage of the act of Congress of July 15, 1870, lands within the original grant to said railroad company were surveyed by the General Government, the Government had a lien upon the lands for the expenses of such survey, and that the fee title could be divested only by payment of such lien. Since the fee title, coupled with an actual interest in the land, remained in the General Government, the Territory of Dakota was powerless to tax such land. It is true that by territorial statute the property of the United States was expressly exempted from taxation; but said statute was unnecessary, as the organic act of the Territory forbade the taxation by the Territory of the property of the United States, and the power cannot exist in a State to tax the property of the United States, even in the absence

of all special provisions. McCulloch *v.* Maryland, 4 Wheat, 316; Van Brocklin *v.* Anderson, 117 U. S., 151, 6 Sup. C't Rep., 670; Tucker *v.* Ferguson, 22 Wall., 527; People *v.* U. S., 93 Ill., 30. Respondent claims that as to all matter of procedure the rule of *caveat emptor* applies to tax-sale purchasers, but that it goes no further; that such purchaser is under no duty to inquire into the facts giving original jurisdiction to impose the tax, and that a taxing municipality should refund in a case like this when it has received money to which it had not only no legal right but to which the Territory was powerless to give it a legal right. On the argument this distinction impressed us, but upon full investigation we fail to find any direct support for it, either in authority or reason. The taxing powers of a State are plenary, and extend to all property within its jurisdiction not specially exempt. *Prima facie* all property within any given county is taxable. The statute says (section 1541, Comp. Laws): "All property, * * * except such property as is hereinafter expressly exempted, shall be subject to taxation." The organic act of the Territory of Dakota (section 12) says: "The legislative power shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States; but * * * no tax shall be imposed upon the property of the United States." Clearly this is a limitation—an exception to the general power. Taxation is the rule; freedom from taxation is the exception. Whoever would claim immunity must bring himself within the exception. He cannot make a *prima facie* case for recovery by
38 simply alleging that he has been taxed. Butler *v.* Supervisors, 26 Mich., 22; Robertson *v.* Commissioners, 44 Mich., 274; 6 N. W. Rep., 659; Davenport *v.* Railroad Co., 38 Iowa, 633; Tucker *v.* Ferguson, *supra*. If any particular property be not taxable, it is because it belongs to a class which by some law has been relieved of the burdens of taxation, and from the very necessities of the situation the power must be lodged somewhere to say whether or not any specified piece of property belongs to any particular class; otherwise no assessment could ever be made; and a particular tract of property that belongs to a class that has been relieved of the burdens of taxation by express legislative enactment is just as free from such burden as the tract that belongs to the class that was never subject to the burden, and the county would have just the same legal right to the money received from a tax sale of the one tract as of the other, and, as we view it, the duty would devolve upon the assessor in each case, and in the one just as much as in the other, to decide primarily whether or not the respective tracts should be assessed. In Foster *v.* Van Wyck, 41 How. Pr., 493, the court says: "It can make no difference in regard to the assessor's jurisdiction whether this immunity from taxation arises from State or national law. In either case the question of liability to taxation is to be determined by the assessors, and they have, of course, jurisdiction to decide it. It is equally a judicial decision in either case, having equal protection from liability for having decided erroneously." Nor must we confound an erroneous decision of the assessor on a matter within his jurisdiction with a want of jurisdiction. The

assessor is the first officer to act in the process of the collection of the public revenue. His jurisdiction depends upon the antecedent act of no official. The law fixes his jurisdiction, and for taxation purposes it is coextensive with its geographical limits and covers the whole subject-matter of assessments. Every tract of land within those limits must either be placed upon or omitted from the assessment-roll, and the matter must in each instance be determined by the assessor. The cases sometimes speak of the assessor as having no jurisdiction to assess exempt property, but this must always be received in connection with the further proposition that the assessor has the right, and it is his duty, to decide what does and what does not belong to the exempt classes. It is true that if the law expressly exempts certain described property, then there is no question of exemption left for the assessor to decide, and he is without jurisdiction to assess the property so described. State *v.* Shacklett, 37 Mo., 280, was a case of that kind. For the full facts in that case it is necessary to consult Railroad Co. *v.* Shacklett, 30 Mo. 550. The capital stock of the railroad company was exempt, but had been assessed by the assessor and the collection of the tax enforced by Shacklett, and an action was brought against the collector and his bondsmen to recover the amount, and the court says: "The officer is bound to know the law, and if he executes process which is void, emanating from a court or officer having no jurisdiction, he acts at his peril and will not be protected where the assessment was illegal. Its illegality was apparent on the very face of the tax books placed in the collector's hands, as much so as if it has purported to have been made on the court-house or other property which the law expressly exempts from taxation." The language of the learned court as applied to the case before it has our full approval. It is no doubt true that if an assessor should return a tract of land as belonging to and assessed against the United States such assessment would be a nullity, and the assessor and all acting after him in the collection or enforcement of such tax would be trespassers. The same would be true should an assessor assess a school-house and grounds against a school township, and the reason would be, in each case, that on the face of the proceedings the officer would be attempting to do what the law positively declared should not be done. But should the same officer in good faith, and relying upon the record as it appears to him, assess property against private parties in possession, but which in fact belonged to the United States or to a school township, such act would not be without jurisdiction, nor would the officer be a trespasser, because upon the face of the record he would be doing only what he had full authority to do. Of course, a tax sale following such assessment would pass no title, but that event always follows an illegal sale and does not prove that the assessor was without jurisdiction. The agreed statement in this case shows that the lands in question formed a portion of the original grant of lands by the General Government to the Northern Pacific Railroad Company. This and similar grants have been held to pass to the grantee an estate *in præsenti*, subject to be defeated by conditions subsequent, and that no patent or conveyance other than the grant was necessary to pass

the title. Buttz *v.* Railroad Co., 7 Sup. C't Rep., 100; Railroad Co. *v.* Peronto (Dak.), 14 N. W. Rep., 103; Railroad Co. *v.* Smith, 9 Wall., 95; Railroad Co. *v.* U. S., 92 U. S., 741. The agreed statement repels the supposition of any failure on the part of the grantee to perform the conditions subsequent, and alleges that prior to the assessment and levy of the taxes for which the lands were sold the Northern Pacific Railroad Company had sold said lands to private parties and conveyed the same by deeds and contracts and such parties were in possession. Now, we are bound to presume, in support of the action of the treasurer, that these transfers appeared of record. At the time of the assessment section 5 of chapter 99 of the Laws of Dakota Territory for 1883 was on the statute books. That section declared that these lands should be taxable as soon as sold or contracted to be sold by the railroad company. It is very evident from the agreed statement that the assessor of the defendant county, in perfect good faith, proceeded to assess the lands in controversy to the parties who appeared by the records of said county to
39 hold the title to said lands and were in possession of the same. This was clearly within his authority and clearly within his duty. The title of the purchaser at the tax sale based upon this assessment fails, not because the proceedings were not regular and sufficient to pass whatever title the parties had in whose name the land was assessed, but because the title was not in such parties and was in the United States. The respondent invokes for his protection the rule of *caveat emptor* as applied to sales on execution in so far as that rule relieves the purchaser of any duty to inquire into the jurisdiction of the court that rendered the judgment. But respondent misconceives the condition. There was no lack of jurisdiction in this case. Upon the ground of a common-law right of recovery we find no reason to distinguish this case from Budge *v.* City of Grand Forks, *supra*.

But plaintiff bases his right to recover more especially upon section 1629 of the Compiled Laws, which is as follows: "When, by mistake or wrongful act of the treasurer, land has been sold on which no tax was due at the time, the county is to save the purchaser harmless by paying him the amount of principal and interest at the rate of twelve per cent. per annum from the date of the sale, and the treasurer and his sureties shall be liable for the amount to the county on his bond, or the purchaser may recover the amount directly from the treasurer." The trial court placed the liability of the county upon this statute, and under the agreed facts reached two conclusions of law: First, that the lands were not taxable when the assessment and levy were made; this is conceded; and, second, that the lands were sold by the mistake and wrongful act of the county treasurer. This conclusion is challenged, and the case turns upon its correctness. The case is of general interest to the State, as nearly all of the counties that include any portion of the grant to the Northern Pacific Railroad Company are directly interested in the result, and the aggregate of money involved is great. This statute appears as section 78 of chapter 28 of the Political Code of 1877. Under that section the purchaser was entitled to re-

cover the amount to which he would have been entitled had the land been rightfully sold; and by another provision of statute the purchaser was then and still is entitled to his principal and interest at the rate of 30 per cent. per annum in case of redemption from rightful sales. But the original section 78 was amended by section 1, c. 130, Laws 1885, by which the rate of interest was limited to 12 per cent., and as thus amended it forms section 1629 of the Compiled Laws. The States of Iowa and Nebraska have similar statutes. So far as we can trace it, the statute originated in the Iowa Code of 1851, where it appears in language almost identical with our section 78 of chapter 28 of the Code of 1877. We do not find the Iowa statute construed by the courts of that State until after the revision of 1860, when the statute appears in a changed form and reads: "When, by the mistake or wrongful act of the treasurer, land has been sold on which no taxes were due or were erroneously assessed," etc.; and closes by making the treasurer liable only for his own acts and those of his deputy. This statute was before the supreme court of Iowa in Coulter *v.* County of Mahaska, 17 Iowa, 92; but in that case the liability of the county for the principal and interest was conceded, and the sole point in dispute was whether or not the county was liable for a 30 per cent. penalty allowed by the Iowa statutes, and the court held that it was not. In Morris *v.* County of Sioux, 42 Iowa, 416, cited by respondent, there was no question under the statute before the court; and Scott *v.* Chickasaw Co., 46 Iowa, 253, was a clear case of wrongful assessment and within the strict words of the Iowa statute.

In Nebraska the law was originally taken from Iowa, but was changed in 1871 to read: "When, by the mistake or wrongful act of the treasurer or other officer, land has been sold contrary to the provisions of this act," etc.; and making such treasurer or other officer liable over to the county on their official bonds; and by a later enactment (see section 131, revision 1881, Neb.) the statute is again changed to read as follows: "When, by the mistake or wrongful act of the treasurer or other officer, land has been sold on which no tax was due at the time, or whenever land is sold in consequence of error in describing such land in the tax receipt, the county is to hold the purchaser harmless," etc.; and closing by declaring that such treasurer or other officer shall be liable only for their own and deputies' acts. The cases of McCann *v.* Otoe Co., 9 Neb., 324; 2 N. W. Rep., 707; Roberts *v.* Adams Co., 18 Neb., 473; 25 N. W. Rep., 726, and *eo nomine*, 20 Neb., 411; 30 N. W. Rep., 405, are cited in support of the judgment in this case; but all those cases were decided after the change in the statute, and the two latter after the second change. What constitutes the illegality is not disclosed in the case in 9 Neb. and 2 N. W. Rep. The court simply remarked that the plaintiff had brought himself within the provisions of their revenue law and was entitled to recover, and added: "The question of the liability of the treasurer or other officer making the mistake or error is not, under the issues, involved in the case." The other cases were precisely alike in principle. The title to the

lands was in the United States, and it was alleged "that said lands were wrongfully placed upon said tax-list by said defendant's commissioners and said defendant's assessor." It is evident in these cases that the sale occurred through the mistake of the assessor, unless, indeed, it is the duty of the treasurer to ascertain for himself, in each instance, whether or not the land is subject to taxation—a point to be considered further on. The statutes of Iowa and Nebraska differ so radically with each other and with ours that it is evident that the decisions under one statute establish no precedent to be followed in the construction of the others. There is another class of statutes making counties liable generally to refund to tax-sale purchasers when the tax sale is invalid, irrespective of any liability over on the part of any officer through whose mistake or wrongful act the sale was made. Such statutes are found in Kansas, Minnesota, Iowa, Wisconsin, Pennsylvania, New York, and in North Dakota since the passage of chapter 132, Laws 1890, and perhaps other States. The common object of these statutes is doubtless to encourage bidding at tax sales by removing all risk of loss to the purchaser. But it is evident, upon statement, that the decisions under these statutes cannot control this case. We must resort to the statute itself and the ordinary rules of construction. The appellant claims that the county treasurer is a ministerial officer, and that in performing his functions he is protected by his warrant, so long as that warrant bears no inherent evidence of infirmity; that he is bound under the law to follow that warrant, and that in the performance of that legal duty he can commit no "wrongful act" within the meaning of the statute; that the county is not liable under the statute in any case unless the county treasurer is primarily liable, and that no liability attaches to the treasurer under the agreed statement. The respondent contends that the tax warrant is neither authority nor protection to the treasurer; that his authority to collect taxes must be found directly in the law, and that outside of the law he has no protection; that the law directs him to sell lands that are "liable for taxes," and that this liability must be determined by himself at his peril without regard to his warrant, and that if he sells lands not liable for taxas he thereby commits a legal wrong—a wrongful act which a court of equity will redress—and brings himself within the terms of the statute. A consideration of the statutes governing the whole subject of taxation will be necessary to enable us to pass upon these contradictory points. Section 638 of the Compiled Laws in prescribing the duties of the treasurer provides that "he shall be the collector of taxes, shall keep his office at the county-seat, and shall attend his office three days in each week. He shall be charged with the amount of all tax-lists in his hands for collection and credited with the amounts collected thereon and the delinquent list, and shall keep a fair and accurate current account of the moneys by him received," etc. Section 639, following, reads: "The books, accounts, and vouchers of the county treasurer and all moneys, warrants, or orders remaining in the treasury shall at all times be subject to the inspection and examination of the board of county commissioners;

and at the regular meeting of the board in January and July of each year and at such other times as they may direct he shall settle with them his accounts as treasurer, and for that purpose shall exhibit to them all his books, accounts, and moneys and all vouchers relating to the same, to be audited and allowed, which vouchers shall be retained by them for evidence of his settlement, and, if found correct, the account shall be so certified; if not, he shall be liable on his bond." Chapter 15, Comp. Laws, being chapter 28 of the Political Code of 1877, was in itself a complete revenue law. It has been superseded by chapter 132 of the Laws of North Dakota for 1890; but this case arose and must be decided under the old law. The first section of said chapter 15, being section 1541, provides that all property shall be taxable unless expressly exempt. Section 1542 enumerates the exemptions and includes the property of the United States. Section 1544 contains the following: "On or before the twentieth day of January of each year the board of county commissioners of each county shall provide for the use of the assessor suitable notices and blank forms for the listing and assessment of all property, and such instructions as shall be needful to secure full and uniform assessment and returns, and a list of all the entered lands in his county or district subject to taxation," etc. Section 1547 reads: "All taxable property, real and personal, shall be listed and assessed each year in the name of the owner thereof as soon as practicable on or after the first Monday in May, including all property owned on the first day of April of that year," etc.; and the remainder of that section and the following sections to 1551 give the assessor full power to assess and list and value all taxable property. Following this are detailed instructionsas to making the assessment-roll, and the equalization by the board of county commissioners, and the levy of the taxes, and the preparation by the county clerk of duplicate tax-lists—one to be retained by the clerk and the other forwarded, with the warrant of the county commissioners attached, to the county treasurer; and section 1596 provides as follows: "An entry is required to be made upon the tax-list and its duplicate showing what it is and for what county and year it is; and the county commissioners shall attach to the lists their warrants, under their hands and official seal, in general terms requiring the treasurer to collect the taxes therein levied according to law; and no informality in the foregoing requirements shall render any proceedings for the collection of taxes illegal. The county clerk shall take the receipt of the county treasurer on delivering to him the duplicate tax-list, with the warrant of the county commissioners attached, and such list shall be full and sufficient authority for the collection by the treasurer of all taxes therein contained." The following sections to and including 1607 provide for the collection of taxes and form of duplicate receipts—one for the tax-payer and one *of* the county clerk—and make the treasurer liable on his bond in case the receipt sent to the clerk does not correspond with his list, and provides for the treasurer's cash book and a duplicate to be kept by the clerk. Section 1608 is as follows: "If on the assessment-roll or tax-list there be any error in the name of the person assessed

or taxed, the name may be changed and the tax collected from the person intended, if he be taxable and can be identified by the assessor or treasurer; and when the treasurer, after
41 the tax-list is committed to him, shall ascertain that any land or other property is omitted, he shall report the fact to the county clerk, who, upon being satisfied thereof, shall enter the same upon his assessment-roll and assess the value, and the treasurer shall enter it upon the tax-list and collect the tax as in other cases." Sections 1610 to 1618, inclusive, provide for the delinquent penalties and liens and for collection by distress and sale. Section 1612 reads as follows: "Taxes upon real property are hereby made a perpetual lien thereupon against all persons and bodies corporate, except the United States and the Territory; and taxes due from any person upon personal property shall be a lien upon any real property owned by such person or to which he may acquire a title." Commencing with section 1619, the statute provides for delinquent tax sale of real estate, and section 1621 is as follows: "On the first Monday of October in each year, between the hours of nine o'clock a. m. and four o'clock p. m., the treasurer is directed to offer at public sale, at the court-house or at place of holding courts in his county or at the treasurer's office, where by law the taxes are made payable, all lands, town lots, or other real property which shall be liable for taxes of any description for the preceding year or years and which shall remain due and unpaid; and he may adjourn the sale from day to day until all the lands, lots, or other real property have been offered; and no taxable property shall be exempt from levy and sale for taxes." The following sections, to and including section 1634, provide for the manner of sale, form of certificate to be issued to purchaser, and for resale in case purchaser does not pay, and for private sale where land is not sold for want of bidders, for time and manner of redemption, and for execution and form of tax deed. Section 1629, being the section under which this claim is made, has already been quoted in full. The remaining sections of the chapter are miscellaneous in their character. Section 1646 provides that the territorial auditor shall procure from the proper land offices a list of lands becoming taxable for the first time in each county, and forward the same to the respective county clerks on or before May 30th of each year; and section 1656 reads as follows: "If any county treasurer shall fail to make return, fail to make settlement, or fail to pay over all money with which he may stand charged at the time and in the manner prescribed by law it shall be the duty of the county clerk, on receiving instructions for that purpose from the territorial auditor or from the county commissioners of his county, to cause suit to be instituted against such treasurer and his sureties or any of them in the district court of his county."

It will be seen that, as a revenue law, this statute is specific, certain, and complete. The various steps are pointed out and the various duties assigned with exactness. What property shall be and what property shall not be taxed are specifically stated. The assessor is charged with the absolute duty and armed with full

authority to assess all taxable property in the county. The board of county commissioners must furnish him with a "list of all entered lands in his county or district subject to taxation;" and "all taxable property, real and personal, shall be listed and assessed each year in the name of the owner thereof," etc.; and the assessment-roll shall contain "a list of all taxable lands in such county." An assessor is a judicial and not a ministerial officer. Farrington *v.* Investment Co. (N. D.), 45 N. W. Rep., 191, and authorities cited. His actions are subject to review by the board of equalization or by certiorari, but until thus set aside or modified his decisions furnish the legal basis on which officers with subsequent duties must act; and the law having at the outset thrown upon the assessor the duty and the power of assessing all taxable property, proceeds upon the presumption that such duty has been done, except that, for the greater protection of the revenue, it provides that property that has been omitted from the roll may be entered thereon by the county clerk and valued, and on the tax-list and the taxes collected as in other cases; but the statute will be searched in vain for any authority on the part of the treasurer to strike from his list any property that the clerk has entered thereon. Upon the assessment-roll, as returned or as modified by the board of equalization, the taxes are levied; and the tax-list and duplicate, which must contain "a list of all the taxable lands in the county," are prepared by the county clerk. One list is retained by the clerk. To the other is attached the warrant of the county commissioners, and the same, with the warrant, is delivered to the treasurer. This warrant directs the treasurer "to collect the taxes therein levied according to law;" and such list "shall be full and sufficient authority for the collection by the treasurer of all taxes therein contained." When this list is delivered to the treasurer he is charged with the full amount thereof, and in his settlement with the commissioners he can be credited only "with the amounts collected thereon and the delinquent list;" and the delinquent list, as thus used, refers to such taxes as cannot, by the use of any means provided by the law, be collected; and if the treasurer fails to thus account for the full amount with which he is charged he and his bondsmen are liable on his official bond. From this view of the statute it would seem that the office of treasurer was purely ministerial. His duties are assigned, their performance demanded, and punishment prescribed for failure. There is no room for discretion. He is as powerless to question the decision of the assessor as is a sheriff with a special execution to question the correctness of a judgment of a court with acknowledged jurisdiction.

But respondent claims that judicial powers are given to the treasurer under section 1621, already quoted, where he is directed to sell all lands "which shall be liable for taxes of any description." The contention is that the order to sell lands that are liable for
42 taxes is equivalent to an order to sell no lands that are not so liable, and that by said section the duty is thrown upon the treasurer to decide in each instance whether or not the property is so liable. This construction, if correct, largely supersedes the office

of assessor. If the treasurer is to disregard his warrant and sell no property not liable for taxes, even though the same appears on his list, it is at least equally true that he must sell all lands that are liable for taxes, although the same do not appear on his list. To perform that duty the treasurer must at once recanvass the county and decide for himself what property is and what property is not subject to taxation. We do not believe such was the legislative purpose. The language is no broader in section 1621 than in section 1593, where the clerk is directed to prepare a list which shall contain "a list of all taxable lands in the county." The mandate to the clerk is as positive as the mandate to the treasurer, but the clerk is to make "a list of all taxable lands in the county, * * * with the names of the persons or parties in whose name each subdivision was listed," etc., clearly showing that his list is to contain only what the assessor has listed. We think section 1621 must have a similar construction. The treasurer can strike nothing from his list and is under no obligation to go outside of his list. But respondent insists, further, that what is now section 1621, when originally passed by the territorial legislature, directed the treasurer to sell "all lands on which the taxes levied for the preceding year still remain unpaid," and that the amendment introduced into the code of 1877 directing the treasurer to sell "all lands liable for taxes of any description for the preceding year or years" was intended to throw this additional and judicial function upon the treasurer, and that if such was not its purpose it is meaningless and inexplicable. We think the amendment susceptible of a very simple explanation. Section 1612 Comp. Laws, as it appeared in the code of 1877, provided, as it does now, that "taxes due from any person upon personal property shall be a lien upon any real property owned by such person or to which he may acquire a title." If real estate could only be sold to satisfy the taxes levied thereon, clearly the provision relative to the lien on realty of taxes on personality would be a nullity; and in order to give effect to that provision it was necessary to direct all lands to be sold that were "liable for taxes of any description," and that undoubtedly was the purpose of the amendment. Viewing the whole statute and all its parts, we are still forced to regard the treasurer as a purely ministerial officer.

Ministerial officers are protected by the process under which they act when that process is fair upon its face and while their acts are strictly within its terms, even though such process was issued improperly and without jurisdiction. There may have been a doubt as to this proposition at one time, but we deem the law too well settled now to make a discussion of the cases profitable. See Cooley, Tax'n (2d ed.), §§ 797, 798; Freem. Ex'ns, § 101; Savacool *v.* Boughton, 5 Wend., 170; Chegary *v.* Jenkins, 5 N. Y., 376; Wall *v.* Trumble, 16 Mich., 228; Sprague *v.* Birchard, 1 Wis., 457; Loomis *v.* Spencer, 1 Ohio St., 153; Little *v.* Merrill, 10 Pick, 547; Erskine *v.* Hohnback, 14 Wall., 613. The cases of Association *v.* Lightner, 47 Mo., 393, and Insurance Co. *v.* Charles, *id.*, 462, and Walden *v.* Dudley, 49 Mo., 419, cited by respondent to show that the collector is

not protected where property is exempt, do not go to the extent claimed.

In the case of 47 Mo., 393, it is said: "But the collector is an executive officer and has always been protected by his precept, unless it appears upon its face to have been issued against property wholly exempt from taxation;" and in the case on page 462, same volume, it is said: "If the tax-list shows jurisdiction he (the collector) is protected;" and in the case in 49 Mo. this language is used: "Were the property expressly and unconditionally exempt, and, by plain description, the collector would be bound to know it." An examination of these authorities shows beyond question that they held the collector protected in all cases unless his warrant showed upon its face that property had been assessed which was absolutely exempt by law, and in such a case the process is not "fair on its face." If therefore it should be admitted that the assessor in this case was without jurisdiction, still the treasurer would be protected; for there is no pretense that there was anything on the face of the warrant, either in its recitals or omissions, that apprised the treasurer of any defects in jurisdiction, or that the treasurer had any such knowledge outside of his warrant.

But it is insisted that the warrant is not the treasurer's authority; that it is not the process under which he acts; that he acts under the law. With our construction of the law, perhaps, the point is not very material in this case. It is no doubt correct, as the supreme court of Ohio held under a statute similar to ours (see Loomis *v.* Spencer, *supra*), that the treasurer's authority comes both from the law and his warrant. He could not sell in a summary manner if the statute did not so provide. The law furnishes him the instrumentalities; the warrant furnishes him the subjects upon which the law's instrumentalities are to be exercised. The supreme court of Iowa, in Parker *v.* Sexton, 29 Iowa, 421, held that the warrant was not the treasurer's authority to sell. The question before the court was whether or not a sale made by a treasurer under a defective warrant was a valid sale (the warrant was without seal), and that court, undoubtedly correct, held that it was. This case was followed by Hurley *v.* Powell, 31 Iowa, 64; Rhodes *v.* Sexton, 33 Iowa, 540; Madson *v.* Sexton, 37 Iowa, 562, and Railroad Co. *v.* Carroll Co., 14 Iowa, 153—all involving the same point and decided in the same way. But the learned supreme court of Iowa, in Parker *v.* Sexton, *supra*, after quoting the section that is substantially the same as our section 1621, says: "Now, it will be observed that by the provisions of this section the tax-warrant requires the treasurer to collect and is authority for the collection of the taxes in the tax-list contained; but it does not authorize him to collect taxes therein named by distress and sale of personal property, nor to sell real estate; nor does it exempt him from liability for illegal or erroneous taxes collected by him. In short, the tax-list and warrant, as provided by this section, becomes simply the authority to collect or receive the taxes, nothing more." This language does not meet our approval as applied to our statute. When the warrant requires the treasurer to "collect the taxes therein levied according

to law," we think it does not simply mean to receive the taxes therein levied according to law, but that it requires the treasurer, if necessary, to use all the instrumentalities of the law to enforce the collection of the taxes; but as the treasurer, in selling the lands in question, acted strictly in accordance with law and within the terms of his warrant, regular and fair on its face, with no inherent indications of infirmity, he is fully protected, unless the peculiar and not altogether perspicuous language of the statute imposes a liability contrary to the general rules governing such cases. The statute, already quoted in full, says: "Where, by mistake or wrongful act of the treasurer, land has been sold on which no tax was due at the time," etc. Respondent contends that every sale of land on which no tax is due is a legal wrong—a wrong for which there is a remedy in a court of equity—and that, as the sale is the act of the treasurer, it is in every instance his wrongful act; that in an action brought to enjoin such sale or to cancel such certificates of sale the treasurer is a necessary party, and that judgment will in such action be rendered against him for costs, as a consequence of his wrongful act; that it would be a strange anomaly if a court of equity should interfere by injunction to prevent a rightful act. But it often happens that upon the record made a certain act may be entirely rightful, and it may be the duty of the appropriate officer to perform such act, yet, by reason of matters *dehors* the record, its performance may be enjoined. A sheriff may have an execution in his hands which he is in duty bound to serve, but by reason of matters *dehors* the record the collection of the judgment on which the execution issued may be enjoined. Says Mr. Cooley: "The general rule is that such an officer (ministerial) is legally protected against any illegalities except those committed by himself, and it is not illegal for him to execute process that comes to him as a ministerial officer from other officers whose action he has no authority to revise or review. Indeed, if we are to judge by the weight of authority, it is more than doubtful if he has any right to do otherwise than to proceed with its execution, even though he may be satisfied that lying back of it are illegalities that would defeat the tax and entitle one who should pay it to reimbursement." Cooley, Tax'n (2d ed.), 798; Wall *v.* Trumble, *supra*. Nor does the incident of costs furnish any criterion by which to gauge the character of the act. If the action were brought after the treasurer, who made the sale, had gone out of office, his successor would be a proper and necessary party defendant, and judgment for costs might be rendered against such successor, but no wrongful act could be charged to him. But will the language of the statute bear the construction that respondent seeks to place upon it? A careful reading of the statute makes it clear to our minds that the legislature never intended to place any ultimate liability upon the counties. In every instance where the county is required to pay under the statute "the treasurer and his sureties shall be liable to the county for the amount on his official bond;" or in every case where liability arises under the statute the party "may recover the same directly from the treasurer." The treasurer and his bond are the ultimate sources of responsible liability; and,

upon respondent's theory, whenever lands are sold upon which no taxes are due that liability arises. It matters not whether the sale occurred through the carelessness or mistake or willful act of the property owner in withholding from the assessor facts which would show his property exempt from taxation, or the mistake of the assessor in adjudging that to be taxable which was not, or the wrongful act of the assessor in purposely listing property that he knew to be exempt, or whether it be the mistake of the clerk in copying the assessor's roll, or the wrongful act of the clerk in purposely falsifying that roll, or whether it be the mistake of the treasurer in failing to give credit for taxes paid or in applying the credit to the wrong description, or the wrongful act of the treasurer in purposely selling lands on which he knew the taxes to have been paid—alike, in each case, the treasurer's bond is the guaranty against the financial loss. We do not think the statute is so elastic. The first and most important thing in the section is a limitation. Before the rule is reached the limitation is announced. The use of the limitation discloses the legislative understanding that it was necessary in order to exclude cases that would otherwise come within the statute. If the legislature intended to throw upon the treasurer that universal responsibility for which respondent contends, then this limitation is worse than surplusage, it is misleading, confusing, and contradictory. We cannot charge that reproach upon the legislature. If the statute read: "When land has been sold on which no tax was due," etc., then it would be entirely perspicuous, and respondent's position would be unassailable; but with the limitation introduced the position is entirely untenable. It is true that whenever land is sold for taxes on which no tax was due there exists a legal wrong. But whose wrong? We have seen that the treasurer has no discretion, he must follow his warrant. It cannot be that where the law commands a thing to be done under pain of punishment to do that particular thing is a wrongful act which in turn must be followed by
44 punishment. The wrong is the wrong of the assessor who assessed property that was not subject to assessment, and not of the mere minister, who could not question his instruction.

There was a statement on argument that the treasurer made a mistake of fact in supposing that the survey fees had been paid when they had not, and that the sale was the result of such mistake. Without holding that the treasurer could make a mistake upon that point, or that it would affect this case if he did, it is a a sufficient answer that there is no suggestion of anything of the kind in the agreed statement of facts. We conclude that the sale in this case was not made by the mistake or wrongful act of the treasurer. We reach that conclusion without considering the effect that the opposite conclusion would have upon county treasurers. When we consider that result our conclusion becomes irresistible. In all cases of liability under the statute as it was passed the treasurer was required to refund to the purchaser the purchase price, with 30 per cent. per annum interest from the date of sale, and since the amendment of 1885 with 12 per cent. per annum interest. The statute will be searched in vain for any source of reimbursement to the

treasurer. He may have exercised the utmost good faith and been without personal fault and have scrupulously accounted to the county for all money received from such sales, yet, if the statute covers the case, his liability is absolute and must be met. It may be that where he has turned over to the county the money received from such sale and is subsequently compelled to repay the money, with the enormous interest, to the purchaser he can recover from the county the money received by it, with legal interest from the time of demand made; but that would be very inadequate financial consolation to the man who had been compelled to pay interest on that sum at 12 or 30 per cent. for a term of years. The case at bar illustrates most forcibly the injustice that would follow such a construction of the statute. The question of the taxability of the lands within the original grant to the Northern Pacific Railroad Company had been in litigation for years. The district court of Dakota Territory had held that they were taxable, and on appeal to the supreme court of the Territory the judgment was affirmed by a divided court. A rehearing was granted, and upon a second argument the judgment was again affirmed by a divided court, and from that judgment of affirmance an appeal was taken to the Supreme Court of the United States. Pending that appeal the lands here involved were assessed and sold for taxes to plaintiff. Prior to such assessment and sale the supreme court of Minnesota had held other portions of the same grant, under identical conditions, to be taxable. Cass Co. *v.* Morrison, 28 Minn., 257, 9 N. W. Rep., 761. After the sale of the lands to plaintiff the Supreme Court of the United States, in deciding the appeal from the supreme court of the Territory of Dakota, held the lands not taxable. Railroad Co. *v.* Rockne, *supra*. But to hold that the county treasurers are liable under this statute for all tax sales of land within said grant prior to the decision in the Rockne case requires us to say that because the county treasurers, in a matter wherein they acted in a purely official capacity, followed not only their warrants, but also the decision of the supreme court of the Territory and of the supreme court of the State of Minnesota—the only courts that had passed upon the question at that time—therefore they incurred liabilities which must inevitably bankrupt them and their bondsmen. In our judgment any statute that would permit, much less compel, such a result would be a stigma upon legislation.

Another point is made in the case. As has been stated, chapter 132 of the Laws of North Dakota for 1890, approved March 11, 1890, provides generally for a recovery by the purchaser of the purchase-money paid for invalid tax-sale certificates. Section 84 reads as follows: "When a sale of land, as provided in this act, is declared void by judgment of court the judgment declaring it void shall state for what reason such sale is declared void. In all cases where such sale has been, or hereinafter shall be, so declared void, or any certificate or deed issued under such sale, shall be set aside or canceled for any reason, or in case of mistake or wrongful act of the treasurer or auditor, land has been sold upon which no tax was due at the time, the money paid by the purchaser at the sale, or by the

assignee of the State upon taking the assignment, and all subsequent taxes, penalties, and costs paid by such purchaser or assignee, shall, with interest at the rate of 10 per cent. per annum from the date of such payment, be returned to the purchaser or assignee, or the party holding his right, out of the county treasury, on the order of the county auditor; and so much of said money as has been paid into the State treasury shall be charged to the State by the county auditor, and deducted from the next money due the State on account of taxes. The county treasurer or auditor shall be liable on their bond for any loss occasioned by any such wrongful act." This section is nearly identical with section 97, c. 11, Gen. St. Minn., and it is claimed that in adopting the section this State adopts it with the construction put upon it by the courts of Minnesota. Such is undoubtedly the general rule. McDonald *v.* Hovey, 110 U. S., 619; 4 Sup. Ct. Rep., 142; Railroad Co. *v.* Moore, 121 U. S., 558; 7 Sup. Ct. Rep., 1334. The supreme court of Minnesota, in State *v.* Cronkhite, 28 Minn., 197; 9 N. W. Rep., 681, held that the Minnesota statute applied to sales made before as well as after the act. There was a special reason for that decision that is not applicable here; but a scrutiny of the two statutes will disclose that they are not identical, and the decision rests squarely upon the variation. Our statute says: "When a sale of land, as provided in this act, is declared void," etc., and "in all cases where any such sale (*i. e.*, a sale as provided in this act) has been, or hereinafter shall be, so declared void," etc. The Minnesota statute reads: "When a sale of land, as provided in this act, is declared
45 void by judgment of court, the judgment declaring it void shall state for what reasons such sale is declared void. In all cases where any sale has been or hereafter shall be declared void," etc. The learned supreme court of Minnesota say: "The whole argument of appellant in support of his position hinges upon the assumption that the words "so declared void" refer exclusively to sales made subsequent to and under the act and thereafter declared void, as prescribed in the first clause of the section. We think any such construction of the act is untenable. No possible reason can be suggested why the legislature should leave a class of cases like the present unprovided for. Similar statutes for the protection of purchasers at tax sales have been in force for years, broad enough to cover all such cases, and it can hardly be supposed that by re-enacting, in substance, an existing law the legislature designed to omit from its benefits any such class of cases without any conceivable reason for doing it. * * * But we think the language will not reasonably admit of the construction claimed. The first clause of the section simply provides what shall be the form of any judgment thereafter to be rendered declaring void a sale of lands for taxes. The second clause is a general provision for the reimbursement of all purchasers at tax sales declared void by judgment of court. Its language is broad and comprehensive, and covers every tax sale declared void by judgment of court, without regard to whether the sale was made before or after the act." In our statute the recovery is limited to sales made as provided in the

act. Minnesota had substantially the same law on her statute books for years before. The new enactment repealed the old; but if a recovery could not be had under the new law for void sales made under the old, then a limited number of cases would come neither under the new or the old law, and the court very properly said that the legislature never could have intended such a result. But this State had no such law until the enactment of chapter 132 of the Laws of 1890, and there is no authority in that statute for applying its benefits to a tax sale made in 1885.

We find no ground upon which respondent has any right of recovery in this case. The district court is directed to reverse its judgment and dismiss the case; appellant to recover costs in both courts. Reversed.

All concur.

J. M. BARTHOLOMEW.
ALFRED WALLIN.
GUY C. H. CORLISS.

(Endorsed:) 1. Filed in the clerk's office, supreme court, State of North Dakota, Nov. 29, 1890. R. D. Hoskins, clerk.

46 In Supreme Court, State of North Dakota.

RICHARD S. TYLER
vs.
THE COUNTY OF CASS.

The respondent in the above-entitled action respectfully petitions and asks that a rehearing and reargument of said cause may be had before this court at the January, 1891, term thereof, for the reasons hereinafter stated, a full discussion of which was not had upon the hearing of the cause.

I.

As we understand the decision, the only obstacle that stands in the way of the plaintiff's right to recover at common law is the holding that the assessor had jurisdiction to assess the lands in question.

The opinion says: "The taxing powers of a State are plenary and extend to all property within its jurisdiction not specially exempt."

There is no question of the soundness of this view if "jurisdiction" for the purpose of taxation is meant, and in view of the law as stated that "the power cannot exist in a State to tax the property of the United States, even in the absence of all special provision," we presume that this is what is meant; otherwise the two propositions of law would be in direct conflict; but the rights of the parties do not arise under the law of "a State" where the power is sovereign, but under the laws of a territorial legislature, deriving all its powers from Congress.

We assume also that the statement that "*prima facie* all property

within any given county is taxable" is intended to mean "all property" within the jurisdiction of such county for purposes of taxation; otherwise the presumption, upon which alone the *prima facie* case rests, must be held to override and nullify the statutes of the United States and the decisions of the Supreme Court of the
47 United States. It cannot be that property presumed to be taxable, which the law plainly declares and reiterates, is not taxable.

The statement in the opinion referred to, taken in its general sense, gives to a presumption a force hitherto denied it and in conflict with all legal principles, and we therefore conclude it was used in the sense herein indicated.

Again, the opinion, quoting from the organic act: "The legislative power shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States, but no tax shall be imposed upon the property of the United States," says, "clearly this is a limitation—an exception to the general power."

We understand the words "general power" to mean the general power to legislate conferred by the organic act, for the reason that all the power possessed by the territorial legislature was derived from the organic act and not from the people.

We understand further the word "limitation" to refer to the last clause of the organic act quoted.

Strike out all the clause entirely and it then ceases to be a limitation or exception, but the case is not changed, for "the power cannot exist in a State to tax the property of the United States, even in the absence of all special provisions."

It is conceded that the lands are not taxable and could not be made taxable by the territorial legislature, but the decision is "there was no lack of jurisdiction in this case."

Upon the question of jurisdiction of the assessor to assess the lands and the validity of his assessment we desire to call the court's attention to a few cases not heretofore cited, for the reason that the question of the want of jurisdiction of the assessor did not seem to be seriously disputed on the argument. It is true counsel
48 for Stutsman county seemed to insist upon such jurisdiction, but without citing authorities to sustain his position.

The assessment in this case is either void or valid. It cannot be both.

Its validity depends upon (1) the jurisdiction of the assessor; (2) the regularity of his proceedings.

The regularity of all proceedings relating to the assessment and of the subsequent proceedings is conceded. The question, then, of the validity of the assessment turns entirely upon the jurisdiction of the assessor, which is twofold: First, of the person, and, second, of the subject-matter. What is the subject-matter?

We apprehend that the reasoning of the court upon the case at bar with reference to the jurisdiction of the assessor over the property within his county has equal force with reference to his decision

as to the taxability or non-taxability of any particular individual within his territorial jurisdiction.

The power must be lodged somewhere to determine whether or not a specific person is assessible within a particular county, and it can only be lodged with the assessor.

If he has jurisdiction to decide these questions, as it is assumed by the court that he has jurisdiction to decide the question of the assessability of any specific piece of property, then the result of his decision in either case must be the same.

The reasoning of the court in the case at bar seems to have its foundation in the case of Foster *vs.* Van Wyck, 41 Howard's Practice, 493, and the cases there cited.

The case referred to was never regularly reported, presumably for the reason that the question of the jurisdiction of the assessor was decided and settled by the decision in Van Allen *vs.* Assessors, 3 Wallace, 573, intermediate the argument and decision of the case of Foster *vs.* Van Wyck, leaving no question of jurisdiction
49 for the consideration of the court and leaving the opinion without binding force.

The case of Van Allen *vs.* Assessors held that the stock of the national bank in controversy was taxable, and, if taxable, of course the assessors had jurisdiction, which was afterwards held in the case of Swift *vs.* Poughkeepsie, a case argued at the same time as the case of Foster *vs.* Van Wyck, but decided by the court of appeals on rehearing and reported in the 37th N. Y., 511.

The court in the latter case took occasion to define exactly the scope of the opinion in the case of Foster *vs.* Van Wyck.

The discussion upon the question at issue commenced in the State of New York in the case of Weaver *vs.* De Vendorf, 3 Denio, 117, which case settled the legal status of assessors and has been repeatedly referred to and approved by the court of appeals of the State of New York.

It places assessors in the same legal status as judges of courts of inferior jurisdiction.

The next discussion of importance upon this question is in the case of Prosser *vs.* Secor, 5 Barb., 607, the decision in which case has been repeatedly cited with approval by the court of appeals and is finally the settled law of the State of New York.

We quote from the opinion: "Thus it will be seen that it is made their duty by statute to ascertain who are taxable and who not by diligent inquiry, and they have no authority to enter any person's name upon the assessment-roll whose property is by law exempt from taxation or to impose an assessment thereon. They have no jurisdiction whatever over such persons or their property. The assessment, when made, is a lien or incumbrance upon the land in the nature of a judgment, upon which, after the levy of the tax, a warrant in the nature of an execution issues. The assessment of the value is a judicial act, upon which a common-law writ of cer-
50 tiorari will lie. 3 Denio, 119. But to make the assessment legal they must have jurisdiction of the particular case. If they transcend their particular authority and undertake to assess

property exempt by statute they cease to be judges and are responsible for all the consequences. *Id.*, 120. It is a familiar principle, well settled and wisely adopted, that inferior tribunals are bound to see that their acts are within the scope of the authority which the statute confers upon them, and whenever they undertake to assume and exercise jurisdiction beyond that they are not protected. The principle is fully recognized in all the cases. It is urged by the counsel for the plaintiffs in error that on making the assessment in question they were acting within the scope of their authority. That the defendant was a resident of their town and the owner of the property assessed, and they were bound to pass upon the question as to whether the defendant was a taxable inhabitant, and that having determined that he was and imposed the assessment in pursuance of their duty they are not responsible if it turns out that his property was exempt. This proposition would be sound if it were left to the assessors to determine who are and who are not the proper subjects of taxation and what property should be exempt and what taxed. But this the legislature have determined, and the authority conferred upon the assessors is to enquire diligently and ascertain and assess such property and only such as the legislature have declared taxable.

If the assessors could make a legal and valid assessment merely by determining that the owner was a taxable inhabitant the statute exemption would be worthless and idle indeed. It would afford no shield to any one, and the assessor would become a lawgiver, whose determinations would annul the statute. It must be quite apparent
51 that the assessors could not by any determination they have power to make subject the property of any person to taxation which the law exempts. In determining whether they have jurisdiction or not in a given case assessors do not act judicially. No officer can acquire jurisdiction by deciding that he has it. In all such cases every officer, whether judicial or ministerial, decides at his peril. It may often be difficult for assessors to determine whether a person is or is not a taxable inhabitant and operate harshly to make them responsible for erroneous decisions in certaincases. But the difficulty is no greater than is encountered in the discharge of the duties of every office, and a due regard to the security of private rights requires that rule should be inflexibly maintained. Private rights would be rendered uncertain and insecure, indeed, should it be left to the determination of the judge or magistrate to fix the bounds of his authority, and doubly so should it be held that such determination was in its nature judicial and the magistrate protected by it in the exercise of power or authority thus acquired."

The next discussion of the question is in the case of People *vs.* Supervisors of Chenango County, 11 N. Y., 563, in which the question was whether the assessor was liable for having entered upon his assessment-roll the name of a non-resident, and in which case the decision cites with approval the case of Prosser *vs.* Secor, 5 Barb., *supra.*

The court says: "If Hygatt had been a resident when assessed and they had erred as to the amount they would not have been

liable for error; but if they had no jurisdiction they are liable. It is only when acting within their limited jurisdiction that they can be protected in acting judicially. If this is so they were liable and might have been prosecuted for their act in subjecting the relator to the payment of an unfounded and illegal tax. The relator had therefore a legal remedy by action."

52 And since this case it has been universally held in New York that whenever the assessor had made an error in deciding when a particular person was subject to assessment within his territorial jurisdiction he is personally liable as a trespasser for the damage which may result.

The next discussion of this question is in Mygatt *vs.* Washburn, 15 N. Y., 316, which holds the same doctrine, that the assessor was personally liable for a mistake in determining when a person whose name he enters upon his list is properly taxable in his town or ward.

In Barhyte *vs.* Sheppard, 35 N. Y., 238, the opinion of the court seemed to hold, as in the case cited from Howard's Practice Reports, that the assessor in determining whether property was exempt from taxation or not acted judicially and was not liable for errors committed in arriving at his conclusions upon that subject.

The facts in this case, however, do not involve the question, and they have been since thoroughly discussed by the court of appeals in the case of The National Bank of Chemung *vs.* The City of Elmira, 53 N. Y., 49, and this case, as well as the case of Swift *vs.* City of Poughkeepsie, have been criticised and limited, and, so far as they attempt to decide that the determination of the assessor whether a specific piece of property is or is not taxable is judicial, have been overruled.

In neither case, however, was the question involved as in the case of Swift *vs.* Poughkeepsie; the property had already been decided by the United States Supreme Court to be taxable, and the case of Barhyte *vs.* Sheppard was one in which a minister of the gospel having property of the value of $25,000 was assessed, as he supposed, without the deduction of his exemption of $1,500, and

53 the distinction is made that the assessor had jurisdiction to assess the minister of the gospel for some amount, and in determining the amount the assessor acted judicially and was protected.

In discussing these questions the court of appeals says in the opinion in The National Bank of Chemung *vs.* Elmira: "While there is some apparent conflict in the application of settled principles to particular cases, I am confident that no adjudged case can be found which will relieve the defendants from liability. The distinction is between an erroneous and illegal assessment. The former is when the officers have power to act, but err in the exercise of the power; the latter where they have no power to act at all, and it does not aid them to decide that they have."

"It is argued that they have jurisdiction to determine what property is taxable in the town."

And this, we understand, is the position taken in the opinion in the case at bar.

The court proceeds: "This is a mistake. The legislature determines that question and the officers have no power over it. The statute requires the assessor to ascertain by diligent enquiry two things: 1, the taxable inhabitants; 2, the taxable property. Where they decide erroneously as to a taxable inhabitant it is conceded and the Mygatt case holds that they are liable as trespassers. Why not when they err as to taxable property? The duty is precisely the same and the power conferred in the same language. Assessors must have jurisdiction over the person and subject-matter. The person must be an inhabitant of the town and the property must be taxable; otherwise the assessment is illegal and void."

This was an action brought to recover back money paid for taxes upon an illegal assessment.

54 The court held that because of illegality the plaintiff should recover.

It may be remarked that the case of Prosser *vs.* Secor, 5 Barb., 607, was severely criticised in Barhyte *vs.* Sheppard in 35 N. Y., but is again quoted from and finally approbed by the court of appeals in the case last cited.

In Dorwin *vs.* Strickland, 57 N. Y., 472, the same principle is again enunciated and the assessor held liable where he has erred as to the assessability of a particular person.

In the matter of Hermance, 71 N. Y., 488, the court says: "If the assessors act within their jurisdiction—that is, if they have jurisdiction of the person and property of the individual assessed—their action is final; if they have no jurisdiction, their acts are void."

In Williams *vs.* Weaver, 75 N. Y., 33, the liability of the assessor is again discussed. The court says: "If they had jurisdiction both of the person taxed and the subject-matter—that is, the property assessed—then their acts partake of a judicial character; if, on the contrary, there is an entire lack of jurisdiction and they make the assessment without it, they are clearly liable."

It may be said that in the case in the 53 N. Y. the prop-

55 erty was bank capital and therefore clearly not assessable.

But the cases cited do not seem to make any distinction between property appearing on the face of the record not to be assessable and that which does not so appear. The question is as to the assessability or liability to taxation, and the case of the matter of the New York Catholic Protectory, 77 N. Y., 342, seems to settle the law in that State and to establish that there is no distinction as to different kinds of property, the only question being, Was it, in fact, taxable?

The case arose under a statute providing that "real and personal estate belonging to and assessed for charitable purposes of said association shall be exempt from taxation." There was no evidence to show whether the particular piece of land was or was not used for such charitable purposes.

It was alleged in the petition for review that, as a matter of fact, it was used for such charitable purposes, and such allegation was not traversed.

The court says: "The assessors consequently had no jurisdiction

to assess that land, and, even if they be deemed to have determined as a fact that the land was used so as to bring it within the exemption, their determination was not conclusive, the fact being one upon which their jurisdiction depended. If the jurisdictional fact did not exist, the determination of the assessors could not establish jurisdiction in them."

The court further says: "The imposition of the taxes in question was manifestly illegal, the property upon which it was assessed being by law exempt from taxation. It was not a case merely of error in judgment in determining the amount of the tax, but of a total want of jurisdiction in the assessors to assess the property at all.

56 See also Hilton *vs.* Fonda, 86 N. Y., 348, where the court defines jurisdiction of subject-matter to be power to make "these" lands liable to a tax ultimately to be levied upon them.

It would seem that this, following the other decisions upon this question in the State of New York, must be deemed to have finally and conclusively settled the question of jurisdiction of assessors and of what constitutes the subject-matter of assessment, and we deduce from the conclusion that in determining the amount or value of the property the assessor acts judicially. In determining whether or not a particular individual is assessable within his territorial jurisdiction or whether or not a particular piece of property situated within his territorial jurisdiction is assessable he acts minister-ally; that a decision of either of these questions in the affirmative confers no jurisdiction upon the assessor, for the reason that they are themselves jurisdictional facts, and he cannot obtain jurisdiction by deciding that he has it.

We have found no cases which have held a contrary doctrine or which have questioned these New York decisions. On the contrary, the cases of—

Preston *vs.* Boston, 12 Pick. (Mass.), 7;
Freeman *vs.* Kenny, 15 Pick., 44;
Gregory *vs.* Bigbee, 42 Vt., 480;
Martin *vs.* Mansfield, 3 Mass., 419;
Agny *vs.* Young, 11 Mass., 220;
Gage *vs.* Currier, 4 Pick., 399;
Sumner *vs.* Dorchester, 4 Pick., 361;
Inglee *vs.* Bosworth, 5 Pick., 498;
Henry *vs.* Edson, 2 Vt., 499 (question of judicial character raised);

57 Fairbanks *vs.* Kitridge, 24 Vt., 9 (question of judicial character raised);
Ware *vs.* Percival, 61 Maine, 391,

sustain the conclusion, and the exact question is decided in Hays *vs.* Pacific Mail Steamship Co., 17 How. U. S., 597, which was a case in which a vessel within the territorial jurisdiction of the assessors in San Francisco was assessed by them.

The question of the judicial character of the assessors in making this assessment was raised. The court says: "We are satisfied that

the State of California had no jurisdiction over these vessels for the purpose of taxation," the same position taken by the respondent in the case at bar.

The court proceeds: "Objection is taken to the recovery against the collector on the grounds, mainly, that the assessment under the law of California by the assessors was a judicial act, and that the party should have pursued his remedy to set it aside according to the provisions of that law. We do not think so. The assessment was not a judicial but a ministerial act, and as the assessors exceeded their powers in making it the officer is not protected."

This case seems in exact accord with the New York cases. In the act of assessing—that is, determining that the vessel was assessable—and in determining to enter it upon his lists the assessor performed a ministerial act, and deciding that he had jurisdiction gave him none.

We further call the attention of the court to the case of Whitney *vs.* Thomas, 23 N. Y., 281, in which the court says: "The supposition entertained by counsel that the assessors have jurisdiction in
58 consequence of their obligation to assess all lands in the town or ward, and that if they make due inquiries and assess according to the best information they can obtain their action cannot be impeached in any collateral proceeding, is erroneous. A warrant issuing from the proper source and regular upon its face may protect the collector, but the assessors have no jurisdiction to assess except as the statute prescribes, and unless they pursue the directions of the statute the assessment is unauthorized and void."

In People *vs.* Schuyler, 69 N. Y., 247, the court says: "Arbritrators, assessors, and all such officers exercising judicial functions cannot take jurisdiction by simply determining that they have it, but they must, in fact, have it before their decision can have any validity, and the fact is always, everywhere, when their decisions are challenged, open to inquiry."

We further refer the court to the case of Dorn *vs.* Backer, 61 N. Y., 261, and Goetcheus *vs.* Mathewson, 61 N. Y., 429, in which the court says: "A similar doctrine is now well settled in this State as to the assessor of taxes. It is maintained, after long discussion, that they are subordinate officers and must act within the authority given them. When their right to act depends upon the existence of some fact, an assessment founded upon an erroneous determination by them of the existence of such a fact is illegal.

They cannot acquire jurisdiction by determining that they have it."

Discussing the same question in Morrow *vs.* Freeman, 61 N. Y., 517, the court says: "This case is governed by the principles announced in National Bank of Chemung *vs.* City of Elmira and many other cases concerning the powers of magistrates or officers having a special authority conferred by statute — must see
59 that he acts within the authority. He cannot acquire jurisdiction by deciding that he has it. He must, in fact, possess it. In other words, the fact must exist upon which the legislature were willing that the officer should act."

Again, mandamus will lie to compel the assessor to strike from his roll non-taxable property and to insert that which is taxable.

Judge Cooley, in his work on taxation, 2nd ed., page 732, says: "The writ will lie to compel the assessors to strike from the assessment-roll non-taxable property which they have included in it. Here is a clear case of excess of jurisdiction, because by the law the subject-matter of the controversy is put beyond their authority and they can lawfully neither list it nor value it."

See People *vs.* Shearer, 30 Cal., 645.

Hvatt *vs.* Allen, 54 Cal., 353.

If the action of the assessor — in determinging whether certain property should be placed upon or omitted from the assessment-roll, "if he has the right and it is his duty to decide what does and what does not belong to the exempt class," then mandamus would not lie. His act would necessarily be judicial and beyond the control of mandamus.

The cases cited would seem to controvert the proposition "that the assessor has a right and it is his duty to decide what does and what does not belong to the exempt classes," and that his affimative decision confers jurisdiction.

It would seem to follow from all the authorities that the decision of the assessor in the case at bar, that the land in question was assessable, was not a judicial determination; that such decision
60 did not confer on the assessor jurisdiction to enter the land on his roll, but was a mere decision that he had jurisdiction and ineffectual for any purpose in excess of his jurisdiction and void; that the subject-matter of the assessment is the particular land sought to be assessed and not the power to decide whether such land should or should not be listed, and that the assessment was void for want of jurisdiction in the assessor of the subject-matter.

If not so void it was a valid assessment and with subsequent regularity of proceedings must convey the title.

In N. P. R. R. *vs.* Traill County, 115 U. S., 600, the court says: "If the assessment is valid and the proceedings well conducted the sale confers a title paramount to all others and thereby destroyes the lien of the United States."

(The fact that the court in the case last cited made the invalidity of the assessment for want of jurisdiction the basis for its decision must be our excuse for not more fully discussing the matter on the last hearing.)

Assuming that the assessor acted judicially in deciding that the land in question was assessable and in entering it upon his roll—in short, that he had, as contended, jurisdiction of the subject-matter, and we are brought logically to the conclusion that the sale in this case passed the title and divested the interest of the United States. It is conceded that this result cannot follow; therefore the assumption is erroneous and the assessment void for want of jurisdiction.

In our examination of cases and text writers we have found that

wherever the doctrine of jurisdiction stated in the opinion in the case at bar has been referred to it is sustained only by reference to the cases of Foster *vs.* Van Wyck, Swift *vs.* Poughkeepsie, and
61 Barhyte *vs.* Sheppard, either or all. We have seen that neither of these cases *are* authority for the doctrine, that it was not involved in their decision, and that it has been distinctly and specifically repudiated by the highest court in New York and is no longer considered sound where it originated and, it would seem, should not be engrafted on the jurisprudence of North Dakota at the outset of her career.

If the cases cited correctly decide the law with reference to the jurisdiction of the assessor in the case at bar over the subject-matter, then, under the case of Chapman *vs.* Brooklyn, heretofore cited in this case (and this is the only case to be found in which the question of the right of the tax purchaser to recover back the money paid at a tax sale void by reason of the want of jurisdiction has been clearly decided), and which has never been questioned or overruled, and by analogy with the rule in cases of sale under execution where the judgment is void for want of jurisdiction, and under the rule that *caveat emptor* does not apply to jurisdictional facts, the judgment of the district court should be affirmed in this case.

III.

Assuming that the assessor had no jurisdiction of the subject-matter, the treasurer was not protected in the sale of the lands in question and his act is wrongful even under the definition adopted by this court.

Dynes *vs.* Hoover, 20 How., U. S., 65.
Wise *vs.* Withers, 3 Cranch, U. S., 331.
Erskine *vs.* Hollenback, 14 Wallace, U. S., 613.
(In this case the decision was based on jurisdiction of the subject-matter.)
Hays *vs.* Pac. Mail Steamship Co., 17 How., U. S., 597.

We are aware that the doctrine of these cases was over-
62 ruled by Savacool *vs.* Boughton, cited by Stutsman county, and that a different doctrine has been held in several of the States, but it must be borne in mind that the rights of the plaintiff do not arise under a State statute.

They arise under a statute of the Territory over which the Congress and courts of the United States had the right of review. The law, as announced by the courts of the United States, applicable to the construction of this statute had become a part of the statute, and the rights of the parties became fixed, under the decisions of the United States courts applicable to the interpretation of the statute, and could not be changed or affected by the change from a territorial to a State government.

The proposition of law announced by the court, that "ministerial officers are protected by the process under which they act when that process is fair on its face, even though issued without jurisdiction," is not the law of the United States, and was not the law of Dakota

Territory when the rights of the respondent accrued, although sanctioned in most of the States.

For the reasons stated, and that the matters herein may be fully discussed, the respondent asks that a rehearing be granted in this case.

STONE & NEWMAN,
Attorneys for Respondent.

Dec. 12, 1890.

(Endorsed:) 1. Petition for rehearing. Filed in the clerk's office, supreme court State of North Dakota, Dec. 13, 1890. R. D. Hoskins, clerk.

63 *Extract from the Minute Record of the Supreme Court of North Dakota, of the January,* 1891, *Term of said Court, Convening at Fargo, in said State, Pursuant to the State Constitution.*

FARGO, N. D., *Jan. 13th,* 1891.

Pursuant to statute, the supreme court of North Dakota convened in the court-house this date at 10 a. m.

Present: Judges Corliss, Bartholomew, and Wallin.

File No. 1.

RICHARD S. TYLER, Respondent,
vs.
CASS COUNTY, Appellant.

Petition for a rehearing herein filed Dec. 13th, 1890, is denied.

R. D. HOSKINS, *Clerk.*

Copy of Petition for Writ of Error.

In Supreme Court, State of North Dakota.

RICHARD S. TYLER, Plaintiff and Respondent,
against
CASS COUNTY, Defendant and Appellant.

Petition for Writ of Error.

To the Honorable David J. Brewer, associate justice of the Supreme Court of the United States:

The petition of the plaintiff herein, Richard S. Tyler, most respectfully shows to your honor that this action arose in the Territorial district court of the Territory of Dakota, which court gave judgment herein in favor of your petitioner and against the defendant for the sum of six hundred twenty-five and $\frac{95}{100}$ dollars, from which judgment the defendant thereupon appealed to the supreme court of the then Territory of Dakota.

That this cause was pending in said territorial supreme
64 court on the admission into the Union of North Dakota as a State, and the supreme court of the State of North Dakota

thereupon succeeded said territorial court in the jurisdiction of this cause.

That thereafter said cause was tried in the supreme court of the State of North Dakota and a judgment rendered therein in favor of the defendant and against your petitioner, reversing the judgment of said territorial district court.

That thereupon and in due time your petitioner filed his petition for a rehearing of said cause in said State supreme court, and upon consideration thereof the same was denied by said court. All of which facts more fully appear from the records in the case, a certified copy of which is herewith submitted.

That your petitioner seeks to recover in this action from the defendant money paid to it as the purchase price of lands belonging to the United States, upon a sale thereof by defendant for delinquent taxes, assessed thereon by the taxing officers of defendant.

That, upon the trial of this cause in the supreme court of the State of North Dakota, plaintiff raised the question of the jurisdiction of defendant's assessor over the lands in question (which were conceded to be a part of the public domain of the United States) for the purpose of assessment for taxation, and based his right of recovery upon the total want of such jurisdiction and the consequent invalidity *ab initio* of the assessment, and his right by reason thereof, under the law applicable to the case, to reimbursement of the money claimed herein.

That said State supreme court denied plaintiff's right to recover for the reason that "there was no want of jurisdiction" of the defendant's assessor over the lands in question. All of which fully appears from the opinion of said State supreme court (pages 1 to 7, inclusive), which is by the constitution and laws of said
65 State of North Dakota made a part of the record in the case and herewith submitted.

Your petitioner further most respectfully shows to your honor that upon the question of the jurisdiction of the assessor of defendant over the lands in question (a part of the public domain of the United States) for purposes of taxation and upon the record herein, a certified copy of which is herewith submitted, he desires a review of the action of the supreme court of the State of North Dakota by the Supreme Court of the United States, and to that end prays that a writ of error to said State supreme court may be allowed herein.

And your petitioner will ever pray, &c.

RICHARD S. TYLER,
Plaintiff and Respondent,
By SETH NEWMAN,
Pl'ff's Att'y.

(Endorsed:) In supreme court, State of North Dakota. Richard S. Tyler *vs.* Cass County. Petition for writ of error. June 4, '91. Writ allowed. David J. Brewer, justice. 113. Filed in the clerk's office, supreme court, State of North Dakota, July 2, 1891. R. D. Hoskins, clerk.

Copy of Undertaking on Appeal.

Know all men by these presents that we, Richard S. Tyler, as principal, and Charles E. Heidel and Andrew C. Killberg, as sureties, are held and firmly bound unto Cass County in the full and just sum of two hundred and fifty dollars, to be paid to the said Cass County, its certain attorney or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, ex-
66 ecutors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 11th day of June, in the year of our Lord one thousand eight hundred and ninety-one.

Whereas lately, at a supreme court of the State of North Dakota, in a suit depending in said court between Cass County, appellant, and Richard S. Tyler, respondent, a judgment was rendered against the said respondent, and the said respondent having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said appellant, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington within sixty days from the date thereof:

Now, the condition of the above obligation is such that if the said respondent shall prosecute said writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

RICHARD S. TYLER. [SEAL.]
CHARLES E. HEIDEL. [SEAL.]
ANDREW C. KILLBERG. [SEAL.]

Sealed and delivered in the presence of—
F. W. HEIDEL.
AMASA P. PEAKE.

Approved by—
D. J. BREWER,
Associate Justice.

June 19th, 1891.

DISTRICT OF NORTH DAKOTA, *ss:*

I hereby certify that the sureties on the within bond are good and sufficient for the penalty therein named.

Witness my hand and the seal of the U. S. circuit court, at Fargo, in said district, this 12th day of June, 1891.

[SEAL.] J. A. MONTGOMERY,
Clerk U. S. C. C.

67 Endorsement on bond: 113. Filed in the clerk's office, supreme court, State of North Dakota, July 2, 1891. R. D. Hoskins, clerk.

68 Supreme Court of the United States.

RICHARD S. TYLER, Plaintiff in Error,
vs.
CASS COUNTY, Defendant in Error.

In error.

Of the October Term of the Year of our Lord One Thousand Eight Hundred and Ninety-one.

Afterwards, to wit, on the first Monday of October of this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington; comes said Richard S. Tyler, by William H. Francis, his attorney, and says that in the record of proceedings aforesaid there is manifest error in this, to wit: That by the record aforesaid it appears that the judgment aforesaid given was given for the said Cass county against said R. S. Tyler, whereas, by the law of the land, the said judgment ought to have been given for the said Richard S. Tyler and against the said Cass county; and the said Richard S. Tyler prays that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment.

WILLIAM H. FRANCIS,
Attorney for Plaintiff in Error.

SETH NEWMAN, *Of Counsel.*

[Endorsed:] Assignment of error. 113. Filed in the clerk's office, supreme court, State of North Dakota, Aug. 4, 1891. R. D. Hoskins, clerk.

Endorsed on cover: Case No. 14794. North Dakota supreme court. No. 1320. Richard S. Tyler, plaintiff in error, *vs.* Cass County. Filed August 10, 1891.

Office Supreme Court U. S.
FILED.
NOV 23 1891
JAMES. H. McKENNEY,
CLERK.

RECORD, CASE NO. 14794.

Supreme Court of the United States

OCTOBER TERM, 1891.

TERM NO. 1320.

RICHARD S. TYLER,
Plaintiff in Error.

vs.

CASS COUNTY,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF NORTH DAKOTA.

Brief for Plaintiff in Error on Motion to Dismiss or Affirm.

WM. H. FRANCIS,
Attorney for Plaintiff in Error.

SETH NEWMAN, of Counsel.

REPUBLICAN-FARGO.

RECORD, CASE NO. 14794.

Supreme Court of the United States

OCTOBER TERM, 1891.

TERM NO. 1320.

Brief of Plaintiff in Error on Motion to Dismiss or Affirm.

The statement of the case as contained in the brief of defendant in Error on this motion, is substantially correct, with the exception found on page three that "plaintiff appealed to the supreme court of the territory and that court reversed the judgment of the court below," the fact being that the defendant, Cass county, appealed to the Supreme Court of the territory. That court did not decide the case and on the admission of North Dakota as a state, the Supreme Court of the state succeeded to the jurisdiction of the Supreme Court of the territory, and heard and decided the case adversely to

plaintiff. Further the record shows (page 7 paragraph 4) that the lands in question "were a part of the public domain of the United States."

It is claimed by Plaintiff in Error that the lands described in the agreed statment of facts (record, page 8, folio 15), by the statute of the United States, (Sec. 1851, Revised Statutes) which provides: "No tax shall be imposed upon the property of the United States," *were not within the jurisdiction of the Territory of Dakota, or its taxing officers for the purpose of assessment for taxation*; that the lands in the territories of the United States are not *prima facie* taxable, and are only taxable upon proof that the title has passed from the United States; that the lands in question possessed this immunity under the constitution and laws of the United States, and by reason of such immuity the assessor of Cass county had no jurisdiction over them whatever, and that by reason of such immunity and such want of jurisdiction, the Plaintiff in Error under the law applicable to the case, in force in the state of North Dakota, as admitted by its Supreme Court, (record pages 23, 24, 25 and 26) was entitled to the relief he claimed.

The right to such relief in the state courts was made to depend, both in the argument and decision, upon the question of the jurisdiction of the assessor over the lands in question, which

were a "part of the public domain of the United States."

The Plaintiff in Error contended that, under the statutes of the United States, the lands possessed immunity from such jurisdiction. The Supreme Court of the state held, (record page 26) "The respondent (plaintiff) *misconceives the condition. There was no lack of jurisdiction in this case.*"

ARGUMENT ON MOTION TO DISMISS.

The questions involved in this motion and to be considered are:

1. Does it appear that any of the questions mentioned in section 709 Revised Statutes of the United States were raised and presented to the state court?

2. Were such questions decided by the state court, or was their decision necessary to the judgment rendered in the case?

3. Was such decision against the right or immunity claimed or asserted by Plaintiff in Error under the constitution, treaties, laws or authority of the United States?

Murdock v. Memphis, 20 Wallace 635.

I

This court has jurisdiction to review the judgment of the Supreme Court of the state of North

Dakota in this case for the reason that it falls under the third sub-division of section 709 of the Revised Statutes. "Where any title, right, privilege or *immunity* is claimed under the constitution or any treaty or statute of, or commission held, or authority exercised under the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed by either party under such constitution, treaty, statute, commission or authority."

The Banks vs. The Mayor, 7 Wallace 16.

This was an action in which "The Banks" sought relief *under a statute of the state of New York.* Their right to such relief depended upon the question *whether certificates of indebtedness of the United States were subject to taxation by the state of New York.* The question of the jurisdiction of this court was raised. The point was made by Counsel (O'Connor and O'Gorman) in their brief that "When the Banks appeared in the state court they had no title, right, or privilege save such as may have been conferred by the State Act. The construction, import and effect of the Constitution and Laws of the United States in respect to taxation by states, *were only incidently brought under consideration in the state*

court—not immediately "Drawn in question" within the meaning of the Judiciary Act.

The Court says: "The judgment of the court of appeals denied the relief upon the ground that certificates of indebtedness were not entitled to exemption. *Is it not clear that in the case before the state court a right, privilege or immunity was claimed under the constitution or a statute of the United States*, and that the decision was against the right, privilege or immunity claimed? and, therefore, that the jurisdiction of this court to review that decision is within the express words of the Amendatory Act of February 5, 1867? There can be but one answer to this question. *We can find no ground for doubt on the point of jurisdiction.*"

The case cited and the case at bar are on all fours. In that, the plaintiff sought relief *under a state statute and* his right to such relief was *dependant on the jurisdiction of the state to assess and tax United States certificates of indebtedness.*

In this, plaintiff seeks relief *under the law as laid down by the State Supreme Court*, and his right to such relief *depends upon the jurisdiction*

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The case cited and the case at bar are on all fours. In that, the plaintiff sought relief *under a state statute and* his right to such relief was *dependant on the jurisdiction of the state to assess and tax United States certificates of indebtedness.*

In this, plaintiff seeks relief *under the law as laid down by the State Supreme Court,** and his right to such relief *depends upon the jurisdiction of defendant's assessor over United States lands* (record page 7 paragraph 4) for the purpose of assessment.

Is there any "ground for doubt on the point of

*The State Supreme Court bases its decision against plaintiffs Common Law right to recover. Solely on the supposed jurisdiction of defendants assessor on lands of the United States (Record p. 2 3. 24. 2 5. 2 6)

jurisdiction" under the third clause of section 709 Revised Statutes?

Counsel in the first point of his "Argument on motion to dismiss" seems to entirely misapprehend the claim of Plaintiff in Error upon the question of jurisdiction, and argues against such jurisdiction on the ground that the interposition of this court is sought under the second subdivision of section 709 R. S. The validity of a statute of a state or territory is in nowise "drawn in question" in this case.

In the cases cited by counsel,

> "*Miners Bank v State, 12 Howard 1.*
> *Messenger v Mason, 10 Wall 507.*
> *Scott v James, 5 Howard 543.*"

the question was as to the power of this court to review the decision of a state Court in cases where the validity of a statute of a state is drawn in question on the ground that it is repugnant to the constitution, treaties or laws of the United States and the decision was in favor of their validity." These cases are in no way applicable to the case at bar.

It is not claimed that this is a case in which "an authority exercised under any state" is drawn in question" on the ground of its repugnance to the constitution, treaties or laws of the United States.

The object of section 709 R. S. seems to be to

confer on this court such jurisdiction as shall prevent encroachments *by the several states* on the rights of the citizen under the constitution, treaties and laws of the United States. In order to give such jurisdiction under the second clause of the statute, it must clearly appear that the statute "drawn in question" was the statute of a state or that the authority exercised was exercised "*under a state.*"

In the case at bar the authority sought to be exercised by the assessor was not exercised *under either a state or territory.* It was exercised contrary to the laws of the territory, which provide (sec. 2 chapter 28 Political Code.)

"The following classes of property shall be exempt from taxation *and may be omitted from the list herein* required to be given:

1. The property of the United States.

The statute further provides, section 8, chapter 28, Political Code, "All taxable property real and personal shall be listed and assessed each year," and section 26 of the same chapter provides, "on or before the first Monday of July annually, the several county assessors shall make out and deliver to the county clerk an assessment roll, containing the following items, to-wit.

1. A list of all the taxable lands in such county."

Nowhere is any authority given to the assessor to assess non-taxable lands, and his action, therefore, in this case, was the exercise of an

authority not "under the territory," but contrary to the statutes of the territory.

The Federal question in this case is: *Were the lands attempted to be assessed by the assessor of the Defendant in Error, without the jurisdiction of such assessor, by reason of their immunity from taxation under the constitution and laws of the United States?*

It appears from the record (pages 23, 24, 25 and 26) that this question "was raised and presented to the state court," and that it was decided against the immunity of such lands from the jurisdiction of such assessor, under the laws of the United States, as claimed by Plaintiff in Error.

We submit that the requisites to confer jurisdiction on this court exist in this case.

II

The federal question was raised at the proper time and in the proper manner in the state courts.

The question was first raised in the district court of Cass county by the agreed statement of facts (record, page 11, paragraph IV.) It is there stated, as a part of the facts claimed to give plaintiff the right to recover, that the land in question was "A part of the Public Domain of the United States," and that the officers of defendant, "authorized to assess property therein for the purposes of taxation and to levy taxes

thereon, assessed and levied taxes on said land, and on each parcel thereof."

The question was again raised and presented to the state supreme court, as shown in its opinion. (Record pages 23, 24, 25 and 26).

It is sufficient that the question was presented to the state supreme court and was decided by that court adversely to plaintiff in error.

Detroit City Ry. Co. v. Guthard, 114 U. S. 133.

In Baldwin v. Kansas, 129 U. S. 52, cited by counsel the state supreme court *declined to pass on the Federal question because it was not raised in the trial court.* The question was *not* decided by the state court. The case is not authority to sustain the proposition of defendant.

III

It is claimed however, that this case presents no federal question on the merits; that the action is a common law action, and the question of recovery a common law or statutory question. So in *The Banks vs. The Mayor, Supra,* the right of recovery was a statutory right; but this court held that the question upon which the right of recovery under the statute depended was a federal question.

In the case at bar the state court held that plaintiff had no common law right of recovery, *because the fact of the want of jurisdiction in the*

assessor over the public domain of the United States, *did not exist.* The Court said:

"There was no lack of jurisdiction in this case. *Upon the ground of common law recovery* we find no reason to distinguish the case from *Budge v. City of Grand Forks.*" 7 N. D. 71 N. W. Rep. 393

in which case the decision wasagainst the right of recovery at common law. Are we justified in saying that the court found no distinction *because* there was "no lack of jurisdiction?

Are we justified in assuming that the meaning of this statement is: "There was no lack of jurisdiction;" therefore, "on the ground of common law right of recovery we find no reason to distinguish?" We submit that by fair implication from the language of the court, the conclusion is irresistible that the decision adversely to plaintiff's common law right of recovery was based upon the conclusion that the land was within the jurisdiction of defendant's assessor, and that, *had it reached a different conclusion with reference to this question, its decision would have been favorable to plaintiff.* The Court says: (record page 24).

"Respondent '(Plaintiff in Error)' claims that as to all matters of procedure the rule of *caveat emptor* applies to tax purchasers, but that it goes no further; *that such purchaser is under no duty to inquire into the facts giving original jurisdiction* to impose the tax, and that a taxing municipality should refund *in a case like this,*

where it has received money to which it had not only no legal right, but to which the territory was powerless to give it a legal right.

On the argument this distinction impressed us; but upon full investigation we fail to find any *direct* support for it, either in authority or reason."

The Court then proceeds to give its reasons for its conclusions that respondents position is untenable. It says: "*Prima facie all property within a given county is taxable,*" and upon this proposition bases an argument in the course of which it says: (Record Page 25.)

"But should the same officer (the assessor) in good faith and relying upon the record as it appears to him *assess property*, against private parties in possession, but *which in fact belonged to the United States*, such act *would not be without jurisdiction*," and which it concludes by saying, (Record Page 26.)

"*There was no lack of jurisdiction in this case.*"

Is it not evident that the reason the court found no support for plaintiff's position was because it was led to the conclusion that there was "no lack of jurisdiction in the case?"

Is it not further evident, by fair implication, that had the court reached the conclusion that there was an entire lack of jurisdiction, the impression made by plaintiff's argument would have shown its effect in a judgment of affirmance. We submit that if the question of the jurisdiction of defendant's assessor over the

"public domain of the United States" is a Federal question, it is, in this case, a Federal question upon the merits, and is the question upon which the record shows the state court based its decision against plaintiff's common law right of recovery.

But it is said the right of plaintiff to recover "is only a general common law question, or a question under the statutes of the territory of Dakota as they existed at the time." So in *The Banks vs. The Mayor*, plaintiff's right was "a question under the statute" of New York. It was, however, dependant upon a Federal question, and this court refused to dismiss the writ. If the question of jurisdiction in that case was a Federal question on the merits, it is in this case. It is contended that the question of jurisdiction is one dependant entirely on the laws of Dakota; But the lands in question had never been within the jurisdiction of the territory, and the statutes of the territory could not affect their status. They were not *prima facie* taxable, and were as much without the control and jurisdiction of the territory of Dakota as though they had been situated in the state of Minnesota. Under the laws of the United States they possessed absolute immunity from the action of the territory and all its officers. It is true that the state court conceded that under the decisions of this court

the lands were not taxable, but in the same breath the court asserts and maintains the jurisdiction of defendant's assessor over them for the purpose of taxation, and reverses the judgment of the lower court solely on the ground of the existence of such jurisdiction; and thus the question of jurisdiction being the basis of the judgment of the state court becomes the material question in the case, and the case does, on the merits, present a material Federal question.

An examination of the case of *Budge vs. the City of Grand Forks*, cited by the state supreme court on the common law right of recovery will disclose the fact that no want of jurisdiction was claimed, and the plaintiff's claim was based solely on *defects in procedure*. It was not denied that the city had jurisdiction to assess the property for the purpose for which it was assessed, and that the failure of plaintiff's title arose solely from *defects in the proceedings*. The court, however, was careful, as in the case at bar to assert such jurisdiction, and to place its judgment squarely on the rule of *caveat emptor*. It says: Cy Clause by the Court /

"*The city had jurisdiction to make the assessment and sell the assessed property for nonpayment*, but by reason of irregularities in the proceedings leading up to the sale, the tax certificates issued by the city treasurer to the pur-

chaser were subsequently decreed to be invalid. Held, that the tax sale purchaser bought under the rule of *caveat emptor*, and in the absence of a statute authorizing it, had no right of action against the city."

Budge v. Grand Forks, 47 N. W. Rep. 390.

An examination of this case makes more irresistible the conclusion that the decision in the case at bar proceeded entirely upon the basis of the jurisdiction of the assessor.

IV

It is contended by Defendant in Error that *"this writ of error should be dismissed for the reason that there is no longer any actual controversy involving real and substantial rights by the parties."*

What are the facts? The judgment reversed was for the sum of $601.68 and was rendered December 30, 1886. It appears from the appendix to the brief of Plaintiff in Error that on the 16th day of December, 1887, Defendant in Error paid to plaintiff the sum of $481.62 in satisfaction of the amounts paid by Plaintiff in Error upon the sale to him of the first and fourth mentioned parcels of land described in the stipulation of facts." (Page 12 record). Of the amount wrongfully taken from Plaintiff in Error as the consideration for the lands sold him, only this sum has ever been returned to him. The balance remains in the treasury of Defendant in

Error and rightfully belongs to the Plaintiff in Error, and constitutes the subject of the controversy in this action. It is true third parties have redeemed all the other lands in question, and the money paid on such redemption, *with the exception of $94.01* (defendants brief page 30, appendix) is shown by the appendix to have been paid to Plaintiff in Error by the treasurer of defendant. But this money did not belong to defendant, and the defendant could not derive any benefit from its payment.

Section 70 of chapter 28, Political Code of Dakota, provides:

"The owner or occupant of any land sold for taxes, or any other person may redeem the same at any time within two years after the day of such sale, or at any time before the execution of a deed of conveyance therefor by the county treasurer, by paying the county treasurer for the use of the purchaser; his heirs or assigns, the sum mentioned in his certificate, and interest thereon at the rate of thirty (30) per cent. per annum from the date of purchase, together with all other taxes subsequently paid, whether for any year or years previous or subsequent to said sale, and interest thereon at the same rate from the date of such payment; and the treasurer shall enter a memorandum of the redemption in the list of sales, and give a receipt therefor to the person redeeming the same, and file a duplicate for the same with the county clerk, as in other cases, *and hold the money paid to the order of the purchaser, his agent or attorney.*"

The treasurer must "hold the money paid subject to the order of the purchaser" and not turn it into the county treasury.

He is the agent for the purchaser and the purchaser has his action against the treasurer should he refuse to pay over this money.

In this case the money paid in redemption from this sale *is paid to relieve the land from the cloud cast upon the title by the sale, and under a misapprehension of the facts which rendered the land non-taxable*, and is a case in which Plaintiff in Error had no ground in conscience to claim it.

At least plaintiff is liable, at any time to have this claim made and established against him.

It is a case in which the money in equity, good conscience and justice belongs to the party who paid it, and he having paid it under a mistake of fact and to relieve his property from a cloud, may recover it back from Plaintiff in Error.

These lands were not taxable. They owed no duty to the territory, or to any municipal subdivision of the territory. The persons who redeemed, and who were the equitable owners subject to the claims of the United States, were not bound in equity or conscience to pay any sum whatever. *In Bend v. Hoyt, 13 Peters*, this court quoting with approval from Lord Mansfield's opinion in Bize v. Dickson, 1, Term rep. 285, says:

"The rule has always been that if a man has

actually paid what the law would not have compelled him to pay, but what in equity and conscience he ought to pay he cannot recover it back again. *But when money is paid under a mistake, which there was no ground to claim in equity and conscience the party may recover it back.*"

And again in *Cary v. Curtis, 3 How. 249* this court in defining the cases where the action will lie, says:

1. "Where the defendant has received money which is the property of plaintiff and which the defendant is obliged by the ties of natural justice and equity to refund."

And again in *March v. Fulton Co. 10 Wallace 684.*

"The obligation to do justice rests upon all persons natural and artificial and, if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation."

See also Louisiana v. Wood, 102 U. S. 294.

Chapman v. County of Douglas, 107 U. S. 348.

Pimental v. City of San Francisco, 21 Cal. 352.

Upon what theory of law, equity, conscience or right can defendant claim the benefit of these payments by third parties to plaintiff?

If plaintiff legally recover in this action the parties paying this money may recover from him on the same ground. Defendant in Error should certainly derive no benefits from such payments, *unless plaintiff can under all circumstances success-*

fully defend against an action brought against him to recover back the money.

Again, the payments claimed to have been made in satisfaction of plaintiff's claim were made long before the case was tried in the state supreme court, and Defendant in Error prosecuted the case to judgment in the state court, and having obtained an unjust judgment now seeks to have it affirmed on the ground of no substantial controversy.

Upon what ground can defendant *now* claim dismissal for want of substantial controversy?

Further the appendix shows that the money paid in redemption of section 31, $94 1-100 was not paid to Plaintiff in Error and there is no proof that he ever received it.

ARGUMENT ON MOTION TO AFFIRM.

The jurisdiction of this court being established, and it appearing that the Federal question was presented to the state court and decided by it adversely to the immunity claimed by Plaintiff in Error, the next question for examination is, *Was the Federal question correctly adjudicated by the state court?*

Murdock v. Memphis Supra.

Did the defendant's assessor have jurisdiction over the lands, "a part of the public domain of the United States" for the purpose of assessment?

The state court in its decision of this question relied solely on the case of *Foster v. Van Wyck, 41 Howard Practice Reports (New York,) 493,* and quotes.

"It can make no difference in regard to the assessors jurisdiction whether this immunity from taxation arises from state or national law. In either case the question of liability to taxation is to be determined by the assessors, and they have, of course, jurisdiction to decide it. It is equally a judicial decision in either case, having equal protection from liability for having decided erroneously."

The State Court proceeds:

Nor must we confound an erroneous decision of the assessor on a matter within his jurisdiction with a want of jurisdiction. The assessor is the first officer to act in the process of the collection of the public revenue. His jurisdiction depends upon the antecedent act of an official. The law fixes his jurisdiction, and for taxation purposes it is co-

coëxsive with its geographical limits, and covers the whole subject matter of assessments. Every tract of land within those limits must either be placed upon or omitted from the assessment roll, and the matter must in each instance be determined by the assessor. The cases sometimes speak of the assessor as having no jurisdiction to assess exempt property, but this must always be received in connection with the further proposition that the assessor has the right, and it is his duty, to decide what does and what does not belong to the exempt classes."

The court further says: "All lands are *prima facie* taxable."

This with reference to the lands in the tearitories of the United States can not be true. The land in the territory outside of Indian Reservations, all originally belonged to the United States. It was all originally not taxable. Neither the territory, nor any municipal subdivision of the Territory, had any jurisdiction over it for the purpose of initiating any proceedings for such purpose. It remains untaxable until the title passes from the United States. This fact can only be known by proof. In the absence of such proof the lands of the United States are presumed to be and are *prima facie* untaxable. The laws of the territory recognized this proposition and provided for such proof.

Sections 77 and 1646 Compiled Laws.

The government of the territory of Dakota was subordinate to that of the United States and not sovereign. It had and could have no power over the lands of the United States, except such as was conferred by the will of the United States. That power with respect to taxation is expressly withheld.

Revised Statutes Sec. 1851.

The general power of legislation conferred by this section cannot be construed to extend to legislation which would in effect restrict the power of the United States, or subject the property of the United States to any burden; this would be in spirit "inconsistent with the constitution and laws of the United States." It must be construed as a general power of legislation with reference to persons and property, *subject to the territorial government.*

The construction of the state supreme court, that the language of Section 1851: "The legislative power of every territory shall extend to all rightful subjects of legislation, not inconsistent with the constitution and laws of the United States", confers a general power of legislation, enabling the territory to tax the property of the United States, and that the clause, "No tax shall be imposed upon the property of the United States", limits such general power, is untenable.

The power under the first clause can certainly be no greater than that possessed by sovereign states, and cannot extend to the taxation of the lands of the United States.

Carroll v. Safford, 3 How. 509.

The section does not, as claimed by the state court, establish the rule with reference to these lands, that "Taxation is the rule, freedom from taxation the exception."

Freedom from taxation is the rule with all property of the United States, and with reference to it the assessor has no duty to perform or decision to make. It is absolutely beyond his jurisdiction for all purposes, and the territorial legislature is powerless to bring it within such jurisdiction.

Carroll v. Safford, Supra.

R. R. Co. v. McShane, 22 Wall 444.

R. R. Co. v. Prescott, 16 Wall 603.

N. P. R. R. Co. v. Rocken, 115 U. S. 600

The last clause quoted is simply declaratory of the general rule of non-taxability of government property.

The reasoning of the State Court and its decision proceed upon the assumption that the assessor *in entering property on his list acts in a judicial capacity*, and that his decision with reference to the matter is, in the language of the court in *Foster vs. Van Wyck, Supra, a judicial decision*, which can not be collaterally attacked.

and is a full protection to "all officers with subsequent functions," and that the *subject matter* on which he has jurisdiction *is not the property assessed* but an intangible thing known "as the subject matter of assessments"

The precise question is raised and decided by this court in *Hays vs. the Pacific Mail Steamship Co., 17 How 597.*

The Court says:

"We are satisfied that the state of California had no jurisdiction *over these vessels* for the purpose of taxation."

"An objection is taken to the recovery against the collector on the ground mainly that the assessment under the law of California by the assessors, *was a judicial act*, and that the party should have pursued his remedy to set it aside according to the provisions of that law. *We do not think so. The assessment was not a judicial but a ministerial act* and as the *assessors exceeded their powers in making it, the officer is not protected.*"

But the doctrine of *Foster vs. Van Wyck*, quoted and followed by the state court, has been repeatedly repudiated by the New York court of appeals, and is not authority in that state.

The case was never regularly reported, presumably for the reason that the question of the jurisdiction of the assessor was decided and settled by the the decision in *Van Allen vs. Assessors*, 3 Wallace 573, intermediate the decision and argument of the case of *Foster vs. Van Wyck*, leaving no question of jurisdiction for the considera-

tion of the court and leaving the opinion without binding force.

The case of *Van Allen vs. Assessors*, held, that the stock of the national bank in controversy was taxable, and, if taxable, of course, the assessors had jurisdiction. The same rule was afterwards held in the case of *Swift vs. Poughkeepsie*, a case argued at the same time as the case of *Foster v. Van Wyck*, but decided by the court of appeals on rehearing and reported in the 37th N. Y. 511.

The court in the latter case took occasion to define exactly the scope of the opinion in the case of *Foster v. Van Wyck*.

The discussion upon the question at issue commenced in the state of New York in the case of *Weaver vs. De Vendorf*, 3 *Denio* 117, which case settled the legal status of assessors and has been repeately referred to and approved by the court of appeals of the state of New York.

It places assessors in the same legal status as judges of courts of inferior jurisdiction.

The next discussion of importance upon this question is in the case of *Prosser vs. Secor*, 5 Barb. 607, the decision in which case has been repeatedly cited with approval by the court of appeals and is finally the settled law of the state of New York.

We quote from the opinion:

"Thus it will be seen that it is made their duty by statute to ascertain who are taxable and who are not, by diligent inquiry, and they have no authority to enter any person's name upon the assessment roll whose property is by law exempt from taxation, or to impose an assessment thereon. *They have no jurisdiction whatever over such persons or their property.* The assessment, when made, *is a lien or incumbrance upon the land in the nature of a judgment*, upon which, after the levy of the tax, *a warrant in the nature of an execution issues.* The assessment of the value is an judicial act upon which a common law writ of certiorari will lie. 3 Denio, 119. *But to make the assessment legal they must have jurisdiction of the particular case.* If they transcend their particular authority *and undertake to assess property exempt by statute, they cease to be judges and are responsible for the consequences.* Id. 120. It is a familiar principle, well settled and wisely adopted, *that inferior tribunals are bound to see that their acts are within the scope of the authority which the statute confers upon them*, and whenever they undertake to assume and exercise jurisdiction beyond that, they are not protected.

This principle is fully recognized in all the cases. It is urged by the counsel for the Plaintiffs in Error that on making the assessment in question they were acting within the scope of their authority. That the defendant was a resident of their town and the owner of the property assessed, and *they were bound to pass upon the question as to whether the defendant was a taxable inhabitant, and that having determined and imposed the assessment in pursuance of their duty, they are not responsible if it turns out that his property was*

except. This proposition would be sound if it were left for the assessors to determine who are and who are not the proper subjects of taxation and what property should be exempt and what taxed. But this the legislature have determined and the authority conferred upon the assessors is to enquire diligently and ascertain and assess such property and *only such as the legislature have declared taxable.*

"If the assessors could make a legal and valid assessment merely by determining that the owner was a taxable inhabitant, the statute exemption would be worthless and idle indeed. It would afford no shield to any one, and *the assessor would become a lawgiver, whose determination would annul the statute.* It must be quite apparent that the assessors could not by any determination they have power to make, subject the property of any person to taxation which the law exempts. In determining whether they have jurisdiction or not in a given case, *assessors do not act judicially.* No officer can acquire jurisdiction by deciding that he has it. In all such cases every officer, whether judicial or ministerial, decides at his peril. It may often be difficult for assessors to determine whether a person is or is not a taxable inhabitant, and operate harshly to make them responsible for erroneous decisions in certain cases. But the difficulty is no greater than is encountered in the discharge of the duties of every officer, and a due regard to the security of private rights requires that the rule should be inflexibly maintained. Private rights would be rendered uncertain and insecure indeed should it be left to the determination of the judge or magistrate to fix the bounds of his authority, and doubly so should it be held that such determination was in its nature judicial and the magistrate protected

by it in the exercise of power or authority thus acquired."

The next discussion of the question is in the case of *People vs. Supervisors of Chenango County*, 11 N. Y. 563, in which the question was whether the assessor was liable for having entered upon the assessment roll the name of a non-resident, and in which case the decision cites with approval the case of *Prosser vs. Secor, 5th Barb. Supra.*

The Court says:

"If Mygatt had been a resident when assessed and they had erred as to the amount, they would not have been liable for error; but if they had no jurisdiction they are liable. It is only when acting within their limited jurisdiction that they can be protected in acting judicially. If this is so they were liable and might have been prosecuted for their act in subjecting the relator to the payment of an unfounded and illegal tax. The relator had, therefore, a legal remedy by action."

And since this case it has been universally held in New York that whenever the assessor made an error in deciding when a particular person was subject to assessment within his territorial jurisdiction, he was personally liable as a trespasser for the damage which may result.

The next discussion of this question is in *Mygatt vs. Washburn*, 15 N. Y., 316, which holds the same doctrine, that the assessor was personally liable for a mistake in determining whether a

person whose name he enters upon his list is properly taxable in his town or ward.

In *Barhyte vs. Sheppard*, 35 N. Y., 238, the opinion of the court seemed to hold, as in the case cited from *Howard's Practice Reports*, that the assessor in determining whether property was exempt from taxation or not acted judicially and was not liable for errors committed in arriving at his conclusions upon that subject.

The facts in this case, however, did not involve the question, and they have been since thoroughly discussed by the Court of Appeals, in the case of the *National Bank of Chemung vs. The City of Elmira*, 53 N. Y., 49, and the case of *Barhyte vs. Sheppard*, as well as the case of *Swift vs. City of Poughkeepsie* have been criticised and limited and so far as they attempt to decide that the determination of the assessor whether a specific piece of property is or is not taxable is judicial, have been overruled.

In neither *Barhyte vs. Sheppard*, or *Swift vs. Poughkeepsie* was the question involved. In the case of *Swift vs. Poughkeepsie* the property had already been decided by the United States Supreme Court to be taxable, and the case of *Barhyte vs. Sheppard* was one in which a minister of the gospel having property of the value of $2,500 was assessed, as he supposed, without the deduction of his exemption of $1,500, and the distinc-

tion is made that the assessor had jurisdiction to assess the minister of the gospel for some amount, and in determining the amount, acted judically and was protected.

In discussing these questions the Court of Appeals says in the opinion in the case of the *National Bank of Chemung vs. Elmira, Supra:*

"While there is some apparent conflict in the application of settled principles to particular cases, I am confident that *no adjudged case can be found which will relieve the defendant from liability.* The distinction is between an *erroneous* and *illegal* assessment. The former is when the officers have power to act but err in the exercise of the power; *the latter where they have no power to act at all*, and it does not aid them to decide that they have.

"It is argued that they have jurisdiction to determine what property is taxable in the town."

(And this, we understand, is the position taken in the opinion of the State Supreme Court in the case at bar.)

The Court proceeds:

"This is a mistake. *The legislature determines that question* and the officers have no power over it. The statute requires the assessor to ascertain by diligent inquiry two things: 1. the taxable inhabitants; 2. the taxable property. Where they decide erroneously as to a taxable inhabitant it is conceded, and the *Mygatt* case holds that they are liable as trespassers. Why not when they err as to taxable property? *The duty is precisely the same* and the power conferred in the

same language. Assessors must have jurisdiction over the person *and subject-matter*. The person must be an inhabitant of the town and the *property must be taxable; otherwise the assessment is illegal and void.*"

In *Dorwin vs. Strickland*, 57 N. Y., 472, the same principle is again enunciated and the assessor held liable where he has erred as to the assessability of a particular person.

In the matter of Hermance, 71 N. Y., 488, the court says:

"If the assessors act within their jurisdiction —that is, if they have jurisdiction of the person *and property of the individual assessed*—their action is final; if they have no jurisdiction their acts are void."

In *Williams vs. Weaver*, 75 N. Y., 33, the liability of the assessor is again discussed.

The Court says:

"If they had jurisdiction both of the person taxed and the subject matter—*that is the property assessed*—then their acts partake of a judicial character; if, on the contrary, there is an entire lack of jurisdiction and they make the assessment without it, they are clearly liable."

But the cases cited do not seem to make any distinction between property appearing on the face of the record not to be assessable and that which does not so appear. The question is, *as to the assessability or liability to taxation*, and the *Matter of the New York Catholic Protectory*, 77 N. Y., 342, seems to settle the law in that state, and to establish that there is no distinction as to

different kinds of property, and that it is immaterial whether the fact of exemption appears from the record or does not appear at all, either from the record or from the nature or use of the property, the only question being: Was it, in fact, taxable?

The case arose under a statute providing that "real and personal estate belonging to and used for charitable purposes of said association shall be exempt from taxation." There was no evidence to show whether the particular piece of land was or was not used for such charitable purposes.

It was alleged in the *petition for review*, that as a matter of fact, it was used for such charitable purposes and such allegation was not traversed.

The Court says:

"The assessors consequently had no jurisdiction to assess that land, and, even if they be deemed to have determined as a fact, that the land was used so as to bring it within the exemption their determination was not conclusive, the *fact being one upon which their jurisdiction depended. If the jurisdictional fact did not exist, the determination of the assessors could not establish jurisdiction in them.*"

The Court further says:

"The imposition of the taxes in question was manifestly illegal, *the property upon which it was assessed being by law exempt from taxation.* It was not a case merely of error in judgment in determining the amount of the tax, *but of a total want of jurisdiction in the assessors to assess the property at all.*"

See also *Hilton vs. Fonda*, 86 N. Y., 348, where the court defines jurisdiction of subject matter to be power to make "*these*" lands liable to a tax ultimately to be levied upon them.

It would seem that this, following the other decisions upon this question in the state of New York, must be deemed to have finally and conclusively settled the question of jurisdiction of the assessors, and what constitutes the subject-matter of assessment, and we deduce from the authorities the conclusion that in determining the amount or value of the property the assessor acts judically, and in determining whether or not a particular individual is assessable within his territorial jurisdiction, or whether or not a particular piece of property situated within his territorial jurisdiction is assessable he acts ministerally; that a decision of either of these questions in the affimative confers no jurisdiction upon the assessor, for the reason that they are themselves jurisdictional facts, and he cannot obtain jurisdiction by deciding that he has it.

See also

Whitney vs. Taylor, 23 N. Y., 281.
People vs. Schuyler, 69 N. Y., 247.
Dorn vs. Backer, 61 N. Y., 261.
Gotchens vs. Matthewson, 61 N. Y., 420.
Morrow vs. Freeman, 61 N. Y. 517.
Freeman vs Kenney, 15 Pick. (Mass.) 33.

Henry vs. Edson, 2 Vermont, 499.
Fairbanks vs. Kitridge, 24 Vermont, 9.
Ware vs. Percival, 61 Maine, 381.

Further, mandamus will lie to compel the assessor to strike from his roll non-taxable property and insert that which is taxable.

Judge Cooley, in his work on taxation, 2nd ed., page 732, says:

"The writ will lie to compel the assessors to strike from the assessment roll non-taxable property which they have included in it. *Here is a clear case of excess of jurisdiction, because by the law the subject-matter of the controversy is put beyond their authority, and they can lawfully neither list it nor value it.*"

See

People vs. Shearer, 30 Cal., 645.
Hyatt vs. Allen, 54 Cal., 353.

Moreover, the validity of this assessment depends only on *the jurisdiction of the assessor over the subject-matter.* Jurisdiction of the person is immaterial. The laws of the territory provide. (Sec. 1641, Compiled Laws.) "The sale of real property shall not be invalid on account of such real property having been listed or charged on the duplicate in any other name than that of the rightful owner."

It is conceded in this case that all proceedings of the taxing officers of defendant, leading up to

and including the sale, were regular, and conformed to the statute.

The assessment was valid if the assessor had jurisdiction. If valid the sale *must* transfer the title.

This court in *N. P. R. R. Co. vs. Rockne*, 115 U. S., 610, says:

"*A valid sale, therefore, for taxes, being the high exercise of sovereign power of the state must carry the title to the property sold, and if it does not do this the assessment is void.*"

Under the decision of the learned State Supreme Court in this case, although the assessor had jurisdiction of the subject matter, the property, and *his assessment is authority for the acts of all officials required to act in the premises*, subsequently thereto and is a protection to "All officers with subsequent functions," yet nevertheless the sale conferred no title on the purchaser.

This is not the rule of this court. In *N. P. R. R. Co. vs. Rockne, supra*, it says:

"*It follows that if the assessment of these taxes is valid and the proceedings well conducted the sale conveys a title paramount to all others, and thereby destroys the lien of the United States. If on the other hand, the sale would not confer such title it is because there was no authority to make it.*"

The entire line of authorities in the United States, except the decision in the court below in the case at bar, seems to be in harmony with the doctrines established by this court, and it is

submitted that under those decisions and under the rulings of this court the decision of the state court upon the Federal question in this case was erroneous, and the decision against the right of plaintiff at common law to recover, being predicated on this erroneous holding, and there being no other matter sufficiently broad to maintain the judgment of that court, notwithstanding such error, the judgment should be reversed:

Murdock vs. City of Memphis, Supra.

II.

At common law, in the absence of statutory provision, when the title fails absolutely by reason of want of jurisdiction of the Territory, or its taxing officers, over the property sought to be taxed, the purchaser may recover.

This is not a case of *defective title* as assumed by defendant, but a case in which the territory was powerless to authorize, initiate, conduct or consummate any proceedings which could, in any event, result in the transfer of any title ever. And this is the basis of all to recover at common law

If plaintiff cannot recover it must be because he had actual knowledge of the facts which reserved these lands from the jurisdiction of the assessor and rendered his acts and every subsequent proceeding absolutely void, or because the law imputed such knowledge to him.

The law imputes to him only knowledge of

those facts of which he is bound under the rule of *caveat emptor* to take notice.

Does that rule extend to the facts which give the assessor jurisdiction?

Was plaintiff bound to ascertain the existence of all the facts necessary to divest the title of the United States?

The statute requires the assessor only to list and assess *taxable* property.

It requires no record to be made in the tax proceedings of the existence of the facts which show that the lands, "a part of the public domain of the United States," have ceased to be such. It is the duty of the assessor to ascertain such facts, *to know that the land is taxable before entering it upon his list.*

Hays v. Steamship Co., 17 How., 597.

The presumption is that all public officers do as the law and their duty require them to do.

The plaintiff had a right to rely on this presumption, and was not bound to ascertain these jurisdictional facts.

The law requires only a record of those acts which are required by the statute to be performed as conditions precedent to the sale. Of the facts shown in this record the purchaser is bound to take notice.

Mr. Cooley in his work on taxation, second edition, page 475, clearly states the rule. He says:

"The tax sale is the culmination of proceedings, which are matters of record and it is a reasonable presumption of law that *where one acquires rights which depend upon matters of record, he first makes search of the record in order to ascertain whether anything shown there by would diminish the value of such rights or tend in any contingency to affect them.* A tax purchaser consequently cannot be, in any strict technical sense, a *bona fide* purchaser, as that term is understood in the law, because a *bona fide* purchaser is one who buys an apparantly good title without notice of anything calculated to impair or affect it, but the tax purchaser is always deemed to have such notice *when the record shows defects.* He cannot shut his eyes *to what has been recorded for the information of all concerned,* and relying implicitly on the action of the officers, assume what they have done is legal, because they have done it."

In Blackwell on tax titles, page 66, the same rule is stated as follows:

"In powers of this nature, a series of acts, preliminary in their character are required by law to precede the execution of the power. Each and every step, from the listing of the land for taxation to the consummation of the title by the delivery of a deed to the purchaser, is a separate and independent fact. All these facts, from the beginning to the end of the proceedings, must exist; and if any material link in the chain of title be wanting, the whole falls to the ground for want of sufficient authority to support it.

"The party claiming under the power is chargeable with notice of irregularity in the proceedings of the officers. He purchases at his peril, the maxim of *caveat emptor* being rigidly applied

sales made upon *valid judgments.* * * * It has, therefore, in a multitude of instances been held that a purchaser under a decree may petition to be released from his purchase, or that the sale be set aside where it has been subsequently discovered that the court rendering the decree had not acquired jurisdiction of the subject-matter.

See also

Henderson vs. Overton, 24 Am. Dec., 492.

Freeman on Void Judicial Sales, Sec. 48.

Freeman on Executives, Sec. 301, Note 7.

Smith vs. Willis, 66 N. Y., 600.

Dodd vs. Neilson, 90 N. Y., 243.

Schwinger vs. Hiveck, 53 N. Y., 280.

Norton vs. Supervisors, 43 Wis., 684.

Bank vs. Rogers, 22 Minn., 224.

Watson vs. Russie, 24 Ill., 282.

Chapman vs. Brooklyn, 40 N. Y. 372.

In the latter case plaintiff sought to recover the consideration paid for lands at tax sale, *void for want of jurisdiction.* The court after discussing the question of failure of consideration says:

"There is no room for doubt but that a remedy would be afforded between individuals for the recovery of money when by *color of void judicial proceeding it might be forcibly taken from one and delivered to another.*"

Plaintiff then had a right to rely on the existence of the facts necessary to confer jurisdic-

tion on defendant's assessor, and may be presumed to have so relied and to have bid under the belief that such facts existed. He will not be presumed to have acted against his interest, and to have purchased and paid his money with knowledge that he could obtain nothing for it. He purchased under a misapprehension with reference to the jurisdictional facts, and paid to the defendant the consideration for such purchase, which defendant had no right in law or good conscience to retain and "to which the Territory was powerless to give it a legal right." It *was not a voluntary payment.* It was made under a mistake of fact, and the consideration has utterly failed. In the language of the court in *Chapman vs. Brooklyn, Supra:*

"The money in controversy, both legally and equitably, belongs to the plaintiff, and it would not be creditable to an enlightened administration of the laws to turn him out of court without it."

The remarks of the court in *Pimental vs. San Francisco,* 21 Cal., 351, are peculiarly applicable to this case, it says.

"The city is not excepted from the common obligation to do justice which binds individuals. Such obligation rests upon all persons whether natural or artificial. If the city obtains the money of another *by mistake* or *without authority of law* it is her duty to refund it *from this general obligation.* If she obtains other property which does not belong to her, it is her duty to restore

it, or, if used, to render an equivalent therefor from like obligation.

"The legal liability springs from the moral duty to make restitution, and we do not appreciate the morality which denies in such cases any rights to the individual whose money or other property has thus been appropriated. The law countenances no such wretched ethics. Its command is always to do justice."

See also

Parsons on Contracts, 2nd Ed. 386.

Schwinger vs. Hickok, 53 N. Y., 286.

Chapman vs. Brooklyn, 40 N. Y., 372.

Louisiana vs. Wood, 102 U. S., 294.

Morville vs. Am. Tract Society, 123 Mass., 129.

Chapman vs. County of Douglas, 107 U. S., 348.

REVIEW OF CASES CITED BY DEFENDANT IN ERROR.

The cases cited by Defendant in Error in support of the proposition that "in a case *like the present one*, there can be no recovery" do not sustain the proposition. They were all cases of *irregularity of proceeding*, and not of *want of jurisdiction*.

In Brevoort vs. Brooklyn, 89 N. Y., 135, the court says:

"It is true that the invalidity of the assessment *appears upon the face of the assessment rolls*."

In Coffin vs. Brooklyn, 116 N. Y., 166, the court says:

"The invalidity of the assessment was apparent on the face of the roll."

In Waples vs. United States, 110 U. S., 630, the sale was under judgment of a court of competent jurisdiction. Not even an irregularity appeared. Under the act of Congress only the interest of Conrad could be sold. Conrad had no interest at the time of the sale; and the purchaser claimed to recover on the ground of warranty by the government. This court says:

"Plaintiff was presumed to know the law on the subject, and that by his purchase under the decree he could only acquire such estate as the alleged offender possessed, to hold during the offenders life; and that if the offender had no estate none was forfeited to the United States or sold underthe decree of the court. So no false assurance could have been made to the purchaser which could be suggested as a possible ground for the return of the money; nor could there have been any *mistake of fact* which would be recognized as a ground for relief, even in equity, for the fact suggested as having been misunderstood *was declared by the law*."

In the case at bar the *fee* was attempted to be sold and was purchased under a mistake of fact.

In Linde vs. Melrose, 10 Allen, 49, there is nothing in the reported case to indicate the ground upon which the decision proceeds. In Massachusetts, however, all property is *prima*

facie taxable. Massachusetts was a sovereign state at the time of the adoption of the Constitution and her power over property within her borders for purposes of taxation, was plenary, and is presumed to have so continued. It is fair to presume, therefore, that the invalidity arose rather from irregularity than from want of jurisdiction. The authorities cited in 2 *Desty on Taxation p.* 850, to support the text will be found *not* to sustain the proposition advanced by counsel, and the same is true of all the authorities cited by Mr. Cooley to support the text cited in the brief of Defendant in Error. *In no case does it appear that the claim to recover was predicated on a total want of jurisdiction in the state and all its taxing officers.*

III.

The statute of the territory of Dakota authorizes a recovery in this case, and the Federal question affects this branch of the case.

Section 78, chapter 28, Political Code of Dakota provides: (as amended in 1885

"When, by mistake or wrongful act of the treasurer, land has been sold on which no tax was due at the time, the county is to save the purchaser harmless by paying him the amount of principal and interest ~~to which he would have been entitled had the land been rightfully sold,~~ * and the treasurer and his sureties shall be liable for the amount to the county on his bond, or the purchaser may recover the same directly from the treasurer."

* at the rate of 12 per cent from the date of sale

The right to recover depends on the *wrongful act of the treasurer*. The state supreme court held that the assessor had jurisdiction, and that by reason of this jurisdiction "all officers with subsequent functions" were protected in acting, and that, therefore, the act of the treasurer was not wrongful. It is true the court remarked that the treasurer would be protected whether there was jurisdiction in the assessor or not, but having held that "there was no lack of jurisdiction" this statement was *dictum* and entirely unnecessary.

The question of whether the act of the treasurer was wrongful, under the decision of the state court, turns upon this question of jurisdiction. If there was no jurisdiction in the assessor the act of the treasurer was wrongful.

In *Dynes v. Hoover*, 20 Howard, 80, this court states the rule as follows:

"The law is that an officer executing the process of a court which has acted without jurisdiction over the subject matter, becomes a trespasser."

See also

Wise v. Withers, 3 Cranch, 337.

Hays v. Pac. Mail Steamship Co., 17 Howard, 597.

Wallace v. Stutsman Co., 6 Dak., 1.

In the case last cited the same questions are presented as in the case at bar. The facts are

identical. The territorial court held plaintiff's right to recover perfect. No opinion was ever written, and the case is now pending in this court on appeal by the county. It presents on the merits all questions presented in this case.*

The rights of Plaintiff in Error became vested under the territorial statute. That statute was adopted when the decisions of this court were controlling, and those decisions as to the meaning of the term "wrongful act" became a part of the statute, and when the statute was adopted by the state it was adopted with that meaning, and a change of the statute by the judicial construction of the state court deprives Plaintiff in Error of his vested rights.

It is submitted that Plaintiff in Error is entitled to be heard on the merits, and that the motion to dismiss and the motion to affirm should both be denied.

WILLIAM H. FRANCIS,
Attorney for Plaintiff in Error.

SETH NEWMAN, of Counsel.

* This case was submitted Nov 13, 1894

Office Supreme Court U. S.
FILED.
OCT 26 1891

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1891. No. 1320.

RICHARD S. TYLER,

Plaintiff in Error,

vs.

CASS COUNTY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA.

BRIEF FOR DEFENDANT IN ERROR ON MOTION TO DISMISS OR AFFIRM.

JOHN F. DILLON,
HARRY HUBBARD,
For Defendant in Error.

To .....

Attorney for Plaintiff in Error.

SIR:

You are hereby notified that the within motion, with the brief annexed thereto, will be presented to the Supreme Court of the United States on Monday the day of November, 1891, at the convening of said Court.

(Signed) JOHN F. DILLON,
Attorney for Defendant in Error.

C. C. PUTNAM'S, WALKER AND CENTRE STREETS, N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1891, NO. 1320.

RICHARD S. TYLER,
Plaintiff in Error,

vs.

CASS COUNTY.

MOTION.

Now comes the attorney for Defendant in Error in the above-entitled cause, and moves this Court: to dismiss the writ of error herein on the ground that this Court has no jurisdiction of this case; or to affirm the judgment of the Supreme Court of the State of North Dakota herein on the ground that although the record may show that this Court has jurisdiction, the question on which the jurisdiction depends is so frivolous as not to need further argument.

(Signed) JOHN F. DILLON,
Attorney for Defendant in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891, No. 1320.

RICHARD S. TYLER,
Plaintiff in Error,

vs.

CASS COUNTY.

BRIEF.

Statement of the Case.

This action was commenced by the presentation by plaintiff of a claim to the Board of County Commissioners for Cass County, Dakota Territory, by which plaintiff sought to recover certain money paid by him as the purchase price of certain real estate sold by defendant's treasurer for delinquent taxes at the annual tax sale on October 6th, 1885. The Board of County Commissioners refused to allow the claim, and plaintiff appealed under the statute to the District Court of Cass County. In that court the case was tried upon an agreed statement of facts without a jury. Judgment was rendered in favor of plaintiff. Thereafter the defendant served notice of motion for a new trial. A statement of the case was then prepared and agreed upon by both parties and approved by the Court (Record, pp. 6–12, 14). This statement contains a stipulation of the facts in the case. The Court after hearing the arguments of counsel rendered a decision finding the conclusions of la was set forth in the Record,

and ordered judgment in favor of the plaintiff. The defendant duly excepted to the decision of the Court. The exceptions were duly settled and allowed by the Court and made part of the judgment roll. The defendant then made a second motion for a new trial. There was on this motion also a like decision, like ruling, judgment and exception (Record, pp. 15, 16). Thereupon plaintiff appealed to the Supreme Court of the Territory, and that Court reversed the judgment of the Court below (Record, p. 20). Thereafter the plaintiff sued out this writ of error to this Court.

THE FACTS in the case, as appear from the agreed statement in the Record, are substantially as follows:

It appears that the real estate in question was a part of the original grant by the United States to the Northern Pacific Railroad Company; that said company had, prior to the levy and sale hereinafter mentioned, disposed of said lands to private parties by deeds and contracts, and such parties were in possession; that no patents were issued for said lands; that the railroad company earned said lands after the passage of the Act of Congress of date July 15th, 1870, in regard to payment of cost of surveying; that said lands were surveyed at the expense of the United States Government, and after the passage of said Act of Congress, and no part of the cost and expense of said survey had, at the time of said tax sale, been repaid by said railroad company to the United States, as provided by the last-mentioned Act of Congress; that in 1884, and prior thereto, the taxing officers of the defendant county proceeded to assess

said lands and levy taxes thereon, all of which remained unpaid on October 6th, 1885, and on said date the treasurer of said county proceeded to sell said lands for delinquent taxes and plaintiff purchased the same, and it was to recover the purchase money so paid that this action was brought. No question is made as to the regularity of the tax sale or the proceedings leading thereto.

ARGUMENT ON MOTION TO DISMISS.

I.

This Court has no jurisdiction to review the judgment of the Supreme Court of North Dakota in this case for the reason that there is no provision either in the Constitution of the United States or the Federal Statutes providing for a re-examination of a judgment of a State Court which upholds the validity of a Statute of a Territory or an authority exercised under a Statute of a Territory.

That a decision of a State Court is reviewable only under what was formerly Section 25 of the Judiciary Act (now, as amended, Section 709 of the Revised Statutes), has been repeatedly decided by this Court, and is a rule so well established that no citation of authorities is necessary.

Section 709 is as follows :

"Sec. 709. A final judgment or decree in any suit in the highest Court of a State, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity ; or where is drawn in question the vadility of a Statute of, or an authority exercised under any *State*, or on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of their validity ; or where any title, right, privilege, or immunity is claimed under the constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed, by either party, under such constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect," &c.

It will be seen that this section provides for a review of a judgment of a State Court by this Court in three cases :

(1) Where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity ; (2) or where is drawn in question the validity of a statute of, or an authority exercised under, any *State* on the ground of their being repugnant to the Constitution, treaty or laws of the United States, and the decision is in favor of their validity ; (3) or where any title, right, privilege or immunity is claimed under the Constitution or any treaty or statute of or provision held or authority exercised under the United States, and the decision is against the title, right, privilege or immunity

specially set up or claimed by either party under such Constitution, treaty, statute, commission or authority.

See on this point

Crowell vs. Randall, 10 Pet., 368, 391.
Daniels vs. Tearney, 102 U. S., 415.
Homes Ins. Co. vs. Augusta, 93 U. S., 116, 121.

The alleged Federal question which it is asserted by the plaintiff in error exists in the present case, is whether the County Assessors of the Territory of Dakota had jurisdiction to assess the lands in question. If this be a Federal question at all it is a Federal question under Clause 2, of Section 709 of the Revised Statutes above quoted, for if it is a Federal question at all it is a question of the validity of an authority exercised under the Territory of Dakota, and is now drawn in question as being repugnant to the Constitution, treaty or laws of the United States.

At the time the assessors assessed the lands in question, and at the time when the lands were sold for taxes and for some time thereafter, the statutes under which the assessors acted were the Statutes of the *Territory* of Dakota. The States of North Dakota and South Dakota were formed and admitted to the Union a long time afterwards. The judgment to which the writ of error in this case is directed was rendered by the Supreme Court of the *State* of North Dakota, and seeks to question an authority exercised under the authority of the *Territory* of Dakota. Section 709 of the Revised Statutes above quoted, which is admittedly by this Court the only statute making provision for the review of a judgment of a State Court, will be searched in vain for any provision authorizing this Court to review the judgment

of a State Court in any case where is drawn in question the validity of a statute or an authority exercised under a *Territory*. This is so clear that no argument can make it clearer.

This Court has already several times decided the exact point here presented. A case on all fours with the present one on this point is *Miners' Bank vs. State of Iowa*, 12 How., 1. The statute drawn in question in that case was a statute of the *Territorial Government* of Iowa, repealing an act of the preceding Territorial Government of Wisconsin. The question arose in the State Court of Iowa after it was admitted to the Union; and, on a writ of error from this Court to the Supreme Court of Iowa, it was decided that this Court had no jurisdiction to review the judgment of the Supreme Court of the State of Iowa in such a case.

DANIEL, J., giving the opinion of the Court, says:

"The alleged wrong the Court are called on to redress is not an act of State power at all; it is an act of the Territorial Government of Iowa, by which was repealed an act of the preceding Territorial Government of Wisconsin; consequently the decision of the Court below asserted no State act or power in opposition to the Constitution, treaties, or laws, or to a commission or authority of or under the United States, and presents, therefore, no ground of jurisdiction here, either as derived from the language of the statute or from any construction heretofore given of it. If the question whether a writ of error would lie from this Court to review the acts of the Territorial Governments could ever have been regarded as in any sense equivocal upon the language of the 25th Section of the Judiciary Act, such a question could not now be considered as open under the express adjudications previously ruled by this Court. Thus, in the case of *Scott vs. Jones*, 5 How., 343, it was expressly declared 'that an objection to the validity of a statute on the ground that the Legislature

which passed it were not competent or duly organized under the Acts of Congress and the Constitution so as to pass valid statutes, is not within the cases enumerated in the 25th Section of the Judiciary Act, and therefore this Court has no jurisdiction over the subject; that, in order to give this Court jurisdiction, the statute, the validity of which is drawn in question, must be passed by a State a member of the Union, and a public body owing obedience and conformity to its Constitution and laws; that if public bodies not duly admitted into the Union undertake as States to pass laws, which might encroach on the Union or its granted powers, such conduct would have to be reached either by the power of the Union to put down insurrection, or by the ordinary penal laws of the States or Territories within which these bodies are situated and acting; but their measures are not examinable by this Court upon a writ of error. They are not States, and cannot pass statutes within the meaning of the Judiciary Acts.' Other cases cited by the Court, in the opinion just quoted, might be adduced to show the difference ever taken by the Court in reference to its relation to the States as States, and as contradistinguished from the Territories of the United States. It seems to us that the control of these territorial governments properly appertains to that branch of the Government which creates and can change or modify them to meet its views of public policy, namely, the Congress of the United States. That control certainly has not been vested in this Court, either in mode or in substance, by the 25th Section of the Judiciary Act. The alleged wrong which the Court are called on to redress is not an act of State power at all. It is an act of the Territorial Government of Iowa, by which was repealed an act of the preceding Territorial Government of Wisconsin."

In the later case of *Messenger vs. Mason*, 10 Wall., 507, the same question was again decided in the same way. Mr. Justice NELSON, giving the opinion of the Court, says:

"One difficulty in bringing the case within this 25th section is, that it makes no provision for the re-exam-

ination of a judgment in a State Court which upholds the validity of a statute of a *Territory* in contravention of the constitution. It applies only to the case where is drawn in question the validity of a statute of, or authority exercised under, any *State*. The circumstances, therefore, that the Court below held the statute of the *Territory* providing for partition of lands among tenants in common, valid, is of no importance in the case."

See also to the same effect *Scott vs. Jones*, 5 How., 343.

See also *Permoli vs. Municipality*, &c., 3 How., 589, in which case this Court refused to review an alleged question whether a State statute of Louisiana was not repugnant to the *Ordinance of 1787*, on the ground that no federal question was involved.

This Court, therefore, for these reasons, has no jurisdiction to review a judgment of the Supreme Court of the State of North Dakota, on the alleged ground that the assessors had no authority or jurisdiction under the laws of the *territory* of Dakota to assess the lands in question. This is not a federal question reviewable by this Court under Section 709 of the Revised Statutes above quoted; and there is no other provision making such question reviewable by this Court.

II.

Even if this Court has jurisdiction of this case, this writ of error should be dismissed for the reason that there is no longer any actual controversy involving real and substantial rights between the parties.

It is a well settled rule in this Court that when there is no actual existing controversy between the parties the writ of error will be dismissed. The plaintiff's claim is based upon the alleged wrongful sales of land described on page 8 of the record in this case. All of said lands have been redeemed from such sales, and the plaintiff has received the money. The proof of this is shown by the official certificate of George E. Nichols, Treasurer of Cass County, printed as an Appendix to this brief, the original whereof is filed in this cause in this Court. This Court does not sit for the purpose of deciding abstract questions of law, but for the purpose of deciding *real and existing controversies* between the parties. The case of *Little vs. Bowers*, 134 U. S., 547, and the authorities cited in theopinion of the Court, are conclusive upon the point here presented. It appeared in that case that the taxes in question had been voluntarily paid by the plaintiff in error pending a suit to determine the legality of the tax. The Court, on this showing, dismissed the writ of error. Mr. Justice LAMAR, giving the opinion of the Court, said:

"It is true that the judgment of the Court below stands unsatisfied, except so far as relates to the costs, which, as before stated, have been paid; but that is immaterial, inasmuch as the controversy upon which that judgment was rendered had been extinguished. That in effect satisfied the judgment. Neither the affirmance nor the reversal of that judgment would make any difference as regards the controversy brought here by this writ of error.

* * * * * *

It is well settled, that when there is no actual controversy, involving real and substantial rights, between the parties to the record, the case will be dismissed. In *Lord vs. Veazie*, 8 How., 251, a writ of error was dis-

missed by this Court where it appeared from affidavits and other evidence by persons not parties to the suit, that there was no real controversy between the plaintiff and defendant, but that the suit was instituted to procure the opinion of this Court upon a question of law, in the decision of which they had a common interest opposed to that of other persons, who were not parties to the suit, and had no knowledge of its pendency in the Circuit Court. Chief Justice TANEY, in delivering the opinion of the Court, said: 'It is the office of courts of justice to decide the rights of persons and of property, when the persons interested cannot adjust them by agreement between themselves—and to do this upon the full hearing of both parties. And any attempt, by a mere colorable dispute, to obtain the opinion of the Court upon a question of law which a party desires to know for his own interest or his own purposes, when there is no real and substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended, and treated as a punishable contempt of Court.'

In *Cleveland vs. Chamberlain*, 1 Black, 419, the rule laid down in Lord vs. Veazie, *supra*, was adhered to, and held applicable to a case in which it appeared that the appellant had purchased and taken an assignment of all the appellee's interest in the decree appealed from; and the appeal was dismissed.

In *Wood Paper Company vs. Haft*, 8 Wall., 333, an appeal upon a bill for the infringement of a patent was dismissed, it having been made to appear to the Court that, after the appeal, the appellants had purchased a certain patent from the defendants under which the defendants sought to protect themselves; and that the defendants, as compensation, had taken stock in the company which was the appellant in the case. And it was further held that the fact that damages for the infringement alleged in the bill had not been compromised did not affect the propriety of the dismissal.

In *San Mateo County vs. Southern Pacific Railroad Company*, 116 U. S., 138, a writ of error was dismissed where it appeared that the taxes assessed against the company had been paid to the county after the suit had been commenced, the Court resting its judgment upon the reason that there was no longer an existing

cause of action in favor of the County against the Railroad Company. To the same effect see *Henkin vs. Guerss*, 12 East, 247; *In re R. J. Elsam*, 3 B. & R. C., 597; *Smith vs. Junction Railway Co.*, 29 Indiana, 546; *Freeholders of Essex vs. Freeholders of Union*, 44 N. J. Law, 438.

* * * * * *

If, as is contended on behalf of the plaintiff in error, the question involved in this case is one of great importance to the Railroad Company and to the State, and is identical with that in a number of other cases pending in the Court below, so much the more important is it that it should not be decided in a case where there is nothing in dispute."

III.

This Court has no jurisdiction in this case because the alleged Federal question was not raised at the proper time nor in the proper manner in the courts below.

It is too late to raise a federal question after final judgment.

Simmerman vs. Nebraska, 116 U. S., 54.

This Court will act only upon the *record* in determining if there be a federal question involved.

Clark vs. Pennsylvania, 128 U. S., 395.

It is too late to raise a federal question for first time at a re-hearing in State Court.

S. Boom Co. vs. W. B. Boom Co., 110 U. S., 57.

It is too late to raise, as the present plaintiff in error seeks to do, a federal question for first time in State Supreme Court on appeal (Record, p. 49).

Baldwin vs. Kansas, 129 U. S., 52.

See also:

Felix vs. Scharnweber, 125 U. S., 54.
State ex. rel. vs. Board of Liquidation, 98 U. S., 140, 142.
Bolling vs. Lersner, 91 U. S., 594.
Blount vs. Walker, 134 U. S., 607.

IV.

Even if we are mistaken in the above points, yet this case on the merits presents no Federal question, and is therefore not reviewable by this Court.

The action in the present case is to recover back, on account of failure of title, certain moneys which were voluntarily paid by purchasers of the lands in question at tax sales. The only question is whether such purchase moneys voluntarily paid can be recovered back. This is not a Federal question. It does not arise under the Constitution, laws or treaties of the United States. If such an action lies at all, it is only an ordinary common law action, or an action under a statute of the Territory. It matters not that the lands in question, which were supposed to be sold, were lands upon which the United States had a lien, and, therefore, under the laws of the United States, they

could not be sold. That fact did not change the nature of the action. It was still a common law or statutory action to recover purchase moneys voluntarily paid at tax sales. No Federal question was in issue. The Supreme Court of the State of North Dakota decided that the lands were not taxable, thus deciding the only Federal question in favor of the validity of the claim made under the laws of the United States and not against it. Hence, the decision is not reviewable here on account of this Federal question.

The plaintiff in error, however, seeks to maintain that inasmuch as the lands in question, by reason of the lien of the United States, were not taxable, and could not be sold for taxes; therefore, he can recover back the purchase moneys which he (or his assignors) voluntarily paid at the tax sales. He admits, as we understand, the well-settled rule that a purchaser at a tax sale cannot, in the absence of statute, recover back the purchase money. This rule is settled by an overwhelming weight of authority and reason.

See

Cooly on Taxation, 2d Edition, pp. 476 and 553.
2 Desty on Taxation, p. 850.
Lynde vs. Melrose, 10 Allen, 49.
Breevoort vs. Brooklyn, 89 N. Y., 135.
Waples vs. United States, 110 U. S., 630.

Many more cases might be cited, but the above are sufficient. In *Coffin vs. Brooklyn*, 116 N. Y., 159, the New York Court of Appeals say (p. 156) that

"The law is settled that the purchaser of a defective title at a tax sale cannot recover the money paid from the city or county for which taxes the land was sold

(*Lynde vs. Melrose*, 10 Allen, 49; *Breevoort vs. Brooklyn*, 89 N. Y., 135)."

The Court accordingly held in that case that plaintiff was not entitled to recover. We understand, however, that the plaintiff in error seeks to urge that while the rule above stated is correct, there is an exception, namely: That if there is no jurisdiction or authority in the assessor to decide whether the land is taxable or not, then the purchase money can be recovered back. And he asserts that in the present case the assessor had no jurisdiction or authority to decide whether the lands in question were taxable, for the reason that these lands were subject to a lien of the United States; and *further, he asserts that the question whether the assessor had such jurisdiction or authority is a Federal question.* The plaintiff in error thus seeks to reverse the judgment of the State Court in the present case, on the ground that it made a wrong decision *upon a Federal question.* That this position is not tenable is, however, obvious upon slight reflection. *It is only a general* COMMON LAW QUESTION OR A QUESTION UNDER THE STATUTES OF THE TERRITORY OF DAKOTA, as they existed at the time, whether the assessor had jurisdiction or authority to decide whether the lands were taxable or not. The assessor was the duly constituted officer of the territory. His duties were prescribed by statute. Those statutes expressly provided that as to the lands within his district he must return a tax list, including in such list all the lands that were taxable. The fact that certain lands were exempt did not relieve him from the necessity of passing for the purpose of the tax list upon the question whether the lands were taxable or not.

And it made no difference for what reason the lands were exempt. The question whether, if the assessor put upon the list as taxable, lands which were exempted, and those lands were afterwards sold for taxes and the purchase money paid by the purchasers at a tax sale, such purchase money could be recovered back by the purchaser is a purely common law question. And it does not alter this question that the exemption from taxation arose under the laws of the United States. The action, if it exists at all, is still a common law action.

Further, it is a complete answer to the position of the plaintiff in error to say that whichever way the question as to whether the assessors had jurisdiction or not be determined, *it would not affect the question in issue in the case, which is, whether the purchase moneys paid out of tax sale can be recovered.* There is no such exception as the plaintiff in error seeks to make to the rule above stated. The rule is general, and without exception, that the purchaser at a tax sale cannot recover back the purchase money in case the title fails, and it is immaterial from what cause the title fails. The plaintiff in error, in the Supreme Court of the State of North Dakota, cited the case of *Chapman vs. Mayor*, 40 N. Y., 272. In regard to this case it is sufficient to say that even if it be correct, it has no application in the present case. In *Chapman vs. Mayor, supra*, the question was whether money paid by a purchaser at a sale of real estate for the non-payment of a street improvement assessment to recover back the purchase money on failure of title to the real estate. In that case, however, there was no power generally and unconditionally to make sales for street assessments, but under the Statutes of the State *there must*

first be personal proceedings against the owner of the land benefited, and only after such personal proceedings against the owner were had did there arise any authority or jurisdiction to sell the land itself for the non-payment of the assessments.

The Court held that the *prior personal proceedings against the true owner* constituted under the statute *a condition precedent* to any jurisdiction to sell the real estate.

That case, therefore, is not at all in point in the present case. That case, moreover, in the Court of Appeals in New York, has always been regarded as peculiar, and has many times been distinguished. The general rule, in New York as well as elsewhere, is that stated by the New York Court of Appeals in the recent case of *Coffin vs. Brooklyn*, 116 N. Y., 159, *supra*, in which the Court say (p. 156):

"THE LAW IS SETTLED that the purchaser of a defective title at a tax sale cannot recover the money paid from the city or county for which taxes the land was sold (*Lynde vs. Melrose*, 10 Allen, 49; *Breevoort vs. Brooklyn*, 89 N. Y., 135)."

This is the law in New York to-day, as elsewhere. The other New York cases cited by the plaintiff in error when this case was before the Supreme Court of the State of North Dakota, were *cases where taxes had been forcibly collected or paid under compulsion*; and, under the ordinary rule in such cases, could therefore be recovered back.

That this Court will not on writ of error to a State Court review a question of common law or a question under a State statute is a rule so well known as to need no citation of authorities. That the question here presented

is such a question of common law or of the construction of a territorial statute, see *Young vs. Steamship Company*, 105 U. S., 41, in which the Court say that a recovery back of a voluntary payment of illegal fees to a United States Shipping Commissioner was not a Federal question.

That a voluntary payment of taxes cannot be recovered back, see also, *Keene vs. Clark*, 10 Peters, 291, which was a suit to recover purchase money of land from which it was claimed the purchaser had been evicted by a survey made under the United States Government. It was held that whether there was an eviction or not was not a Federal question.

In *Lange vs. Benedict*, 99 U. S., 68, the facts were as follows: In a former case there had been a prosecution under a United States statute. The Judge before whom the case was prosecuted pronounced a sentence which was afterwards adjudged to be illegal. A personal action was brought, in the State Court of New York for damages against the Judge (BENEDICT). It was held that he was not liable; and on writ of error, this Court held that the action for damages presented no Federal question. The same ruling was made in the similar case of *Manning vs. French*, 133 U. S., 186.

In *Williams vs. Weaver*, 100 U. S., 547, it was decided that the judgment of the State Court that a Board of Assessors are not personably liable for a wrong assessment is not a Federal question.

This case, therefore, even if other conditions were satisfied (and they are not), presents no Federal question in the matter of the jurisdiction or authority of the assessor.

ARGUMENT ON MOTION TO AFFIRM.

If this Court has jurisdiction at all it has jurisdiction to determine only the question as to whether the assessor of the territory had jurisdiction to decide whether or not to place the lands in question upon the tax list. The question of the right of the plaintiff to recover on the ground that he has a *common law action* for the recovery of money in such a case, as well as the question of a like *statutory remedy*, are *not Federal questions*. On these questions the judgment of the Supreme Court of the State is conclusive. This Court will review only the Federal question, if such question there be. We have endeavored to show in the argument upon the motion to dismiss, *supra*, that whether the assessor, as an assessor, had jurisdiction in the technical sense or not was *immaterial*, and therefore there was no Federal question (if jurisdiction of the assessor be a Federal question) involved in this case. We proceed, now, to show on this motion to affirm that the assessor as a matter of fact did have jurisdiction, and so, if this be a Federal question, that the judgment must be affirmed.

It is too clear for argument that if the assessor acted strictly under and in accordance with the the law of the Territory which created his office and prescribed his duties, then he acted within his jurisdiction. In other words, the jurisdiction of the assessor is determined by the law creating him and under which he acts. A distinction must here be borne in mind: To say that the assessor has jurisdiction is not the same thing as saying that the assessor decides rightly in every

instance. Jurisdiction means merely that he has the *right to decide*—whether such decision be right or wrong. Now, in the present case the assessor was, by express provision of law, required to assess every tract of land within the limits of his geographical district. Dakota Political Code, 1877, Chap. 28, contains the provisions in regard to the assessment, levy and collection of taxes. In that chapter it is in substance provided, that *the assessor shall, as to every tract of land within the limits of his district, decide and determine whether it shall be placed upon or omitted from the assessment roll.* There is *no condition precedent* to be performed before the assessor must make his decision, as there was in *Chapman vs. Mayor*, 40 N. Y., 272, before the land in that case could be sold. It is unnecessary here to refer at length to the provisions of the statutes above mentioned. The Supreme Court of the State of North Dakota in its opinion in the present case, 48 N. W. Rep., pp. 232, 234 (reprinted in full in the Record, pp. 22 38), states in an admirable manner the correct doctrine as to this question of jurisdiction.

"If any particular property be not taxable it is because it belongs to a class which by some law has been relieved of the burdens of taxation; *and from the necessities of the situation the power must be lodged somewhere to say whether or not any specified piece of property belongs to any particular class. Otherwise no assessment could ever be made.* And a particular tract of property that belongs to a class that has been relieved of the burdens of taxation by express legislative enactment, is just as free from such burdens as the tract that belongs to a class that was never subject to the burden, and the county would have the same legal right to the money received from a tax sale from one tract as from the city, and as we view it the duty

would devolve upon the assessor in each case, and in the one case just as much as in the other to decide primarily whether or not the respective tracts should be assessed. In *Foster vs. Van Wyck*, 14 How. Pr., 493, the Court says: 'It can make no difference in regard to the assessors' jurisdiction, whether this immunity from taxation arises from State or National law. In either case the question of liability to taxation is to be determined by the assessors, and they have, of course, jurisdiction to decide it. It is equally a judicial decision in either case, having equal protection from liability for having decided erroneously.' *Nor must we confound an erroneous decision of the assessor on a matter within his jurisdiction with a want of jurisdiction. The assessor is the first officer to act in the process of the collection of the public revenue. His jurisdiction depends upon the antecedent act of no official.* [In *Chapman vs. Mayor, supra* jurisdiction to sell did depend upon the performance of a condition precedent, namely, prior personal proceedings against the true owner.] The law fixes his jurisdiction, and for taxation purposes it is co-extensive with its geographical limits, and covers the whole subject matter of assessments. *Every tract of land within those limits must either be placed upon or omitted from the assessment roll, and the matter must in each instance be determined by the assessor.* The cases sometimes speak of the assessor as having no jurisdiction to assess exempt property; but this must always be received in connection with the further proposition that the assessor has the right, and it is his duty, to decide what does and what does not belong to the exempt classes. It is true that if the law expressly exempts certain *described* property, then there is no question of exemption left for the assessor to decide, and he is without jurisdiction to assess the property so *described*. *State vs. Shacklett*, 37 Mo., 280, was a case of that kind. For the full facts in that case it is necessary to consult *Railroad Co. vs. Shacklett*, 30 Mo. 550. The capital stock of the railroad company was exempt, but had been assessed by the assessor, and the collection of the tax enforced by Shacklett, and an action was brought against the collector and his bondsmen to recover the amount, and the Court says: "The officer is bound to know the law; and if he executes process which is void, emanating from a court or officer having no jurisdiction, he acts at his peril, and will not be

protected where the assessment was illegal. Its illegality was apparent on the *very face* of the tax books placed in the collector's hands, as much so as if it has purported to have been made on the court house, or other property which the law expressly exempts from taxation. [In the present case the non-liability to taxation depended upon an extrinsic fact, namely, non-payment of survey fees—a fact not known to the assessor.] The language of the learned Court, as applied to the case before it has our full approval. It is no doubt true that if an assessor should return a tract of land as belonging to and assessed against the United States, such assessment would be a nullity; and the assessor and all acting after him in the collection or enforcement of such tax would be trespassers. The same would be true should an assessor assess a schoolhouse and grounds against a school township; and the reason would be in each case that on the face of the proceedings the officer would be attempting to do what the law positively declared should not be done. But should the same officer in good faith and relying upon the record as it appears to him, assess property against private parties in possession, but which in fact belonged to the United States or to a school township, such act would not be without jurisdiction, nor would the officer be a trespasser, because upon the face of the record he would be doing only what he had authority to do. Of course, a tax sale following such assessment would pass no title; but that event always follows an illegal sale, and does not prove that the assessor was without jurisdiction. The agreed statement in this case shows that the lands in question formed a portion of the original grant of lands by the general government to the Northern Pacific Railroad Company. This and similar grants have been held to pass to the grantee an estate in *præsenti*, subject to be defeated by conditions subsequent, and that no patent or conveyance other than the grant was necessary to pass the title. *Butts vs. Railroad Co.*, 7 Sup. Ct. Rep., 100; *Railroad Co. vs. Peronto* (Dak.), 14 N. W. Rep., 103; *Railroad Co. vs. Smith*, 9 Wall., 95; *Railroad Co. vs. U. S.*, 92 U. S., 741. THE AGREED STATEMENT REPELS THE SUPPOSITION OF ANY FAILURE ON THE PART OF THE GRANTEE TO PERFORM THE CONDITIONS SUBSEQUENT, and alleges that, prior to the assessment

and levy of the taxes for which the lands were sold, the Northern Pacific Railroad Company had sold said lands to private parties, and conveyed the same by deeds and contracts, and such parties were in possession. Now, we are bound to presume, in support of the action of the treasurer, that these transfers appeared of record. At the time of the assessment, Section 5 of Chapter 99 of the Laws of Dakota Territory, for 1883, was on the statute books. That section declared that these lands should be taxable as soon as sold or contracted to be sold, by the railroad company. It is very evident from the agreed statement that the assessor of the defendant county, in perfect good faith, proceeded to assess the lands in controversy to the parties who appeared by the records of said county to hold the title to said lands, and were in possession of the same. This was clearly within his authority, and clearly within his duty. The title of the purchaser at the tax sale, based upon this assessment, fails, not because the proceedings were not regular and sufficient to pass whatever title the parties had in whose name the land was assessed, but because the title was not in such parties, and was in the United States. The respondent invokes for his protection the rule of *caveat emptor* as applied to sales on execution in so far as that rule relieves the purchaser of any duty to inquire into the jurisdiction of the Court that rendered the judgment. But respondent misconceives the condition. There was no lack of jurisdiction in this case. Upon the ground of a common law right of recovery we find no reason to distinguish this case from *Budge vs. City of Grand Forks*, *supra*, 47 N. W. Rep., 390."

The question, therefore, of jurisdiction of the assessor to decide as to assessing the lands in question was a common law or statutory question, and for this reason the writ should be dismissed; or, if this be a Federal question, then it was decided rightly and the judgment should be affirmed.

FURTHER, If this Court should be of opinion that it has jurisdiction in this case, and can look into anything more than the alleged Federal question, then we submit that the judgment of the Supreme Court of the State of North Dakota herein should be affirmed: *1st.* Because it is well settled that at common law, in the absence of statute, the plaintiff in error has no remedy in a case like the present; and, *2nd*, because his case does not fall within the terms of the statute of the Territory of Dakota hereafter referred to.

I.

The law is well settled that at common law, in the absence of Statute the purchaser of a defective title at a tax sale cannot recover the money paid.

The authorities are unanimous and overwhelming in support of this proposition. See

Cooley on Taxation, 2d Edition, pp. 476 and 553.
2 Desty on Taxation, page 850.
Lynde vs. Melrose, 10 Allen, 49.
Brevoort vs. Brooklyn, 89 N. Y., 135.
Waples vs. U. S., 110 U. S., 630.

In *Coffin vs. Brooklyn*, 116 N. Y., 159, the New York Court of Appeals say (p. 156) that:

"The law is settled that the purchaser of a defective title at a tax sale cannot recover back the money paid from the city or county for which taxes the land was sold (*Lynde vs. Melrose*, 10 Allen, 49; *Brevoort vs. Brooklyn*, 89 N. Y., 135)."

In Cooley on Taxation, *supra*, the learned author states the rule in the same manner. So also Desty on Taxation, *supra*. The law on this point is too well settled to admit of doubt or discussion. The case of *Chapman vs. Mayor*, 40 N. Y., 272, was cited by plaintiff in the Supreme Court of the State of North Dakota as being an authority in favor of a recovery in such case. It is sufficient to say in regard to that case, however, that it has no application to a case like the present. The facts in that case were peculiar, and the case has always been so regarded in the New York Court of Appeals, where it has been many times cited. The rule of law in New York, as elsewhere, is that quoted from *Coffin vs. Brooklyn*, *supra*. See further in regard to this case of *Chapman vs. Mayor*, this brief Point IV., Argument on Motion to Dismiss, *supra*.

In the absence of statute, therefore, the law is well settled that in a case like the present one there can be no recovery. We proceed now to show that the statute of of the Territory of Dakota, which is referred to by the plaintiff in error, does not authorize a recovery in the present case.

II.

The statute under which the plaintiff in error claims does not authorize a recovery in the present case.

The statute under which the appellees claim is as follows:

"When by mistake or wrongful act of the treasurer, land has been sold on which no tax was due at the time, the county is to save the purchaser harmless by

paying him the amount of principal and interest, to which he would have been entitled had the land been rightfully sold, *and the treasurer and his sureties shall be liable for the amount to the county on his bond, or the purchaser may recover the same directly from the treasurer.*"

Dakota Political Code, Sec. 78, Ch. 28 (Levisee, 2d Ed., p. 483).

The first part of the statute makes the county liable "when by mistake or wrongful act of the *treasurer*, land has been sold;" the last part of the statute imposing a *personal liability* to the purchaser directly *upon the treasurer*. The statute further provides that in case the recovery is first had against the county, the county shall have a remedy over against the treasurer and his sureties. In any event, therefore, the liability is to fall wholly and exclusively upon the treasurer. But such personal liability of the treasurer could be appropriate only in case the treasurer was himself at fault in selling the land. For this reason the statute creates the liability only for "the mistake or wrongful act of the *treasurer*." The liability of the county exists only for the mistake or wrongful act of the *treasurer*, and not for that of any other officer; for the treasurer is made liable whenever the county is made liable, and clearly the treasurer is not liable except for his own mistake or wrongful act. Could anything be clearer than this?

In the present case the mistake or wrongful act, if any, was not that of the treasurer, but of the assessor. The lands were assessed and a list of the taxes handed to the treasurer for collection, which list was by statute expressly made "*full and sufficient authority*" for the treasurer. The treasurer had no alternative but to col-

lect the taxes on the list committed to him, and to sell the lands on which the taxes were not paid. The statute is as follows:

"An entry is required to be made upon the tax list and its duplicate, showing what it is and for what county and year it is; and the County Commissioners shall attach to the lists their warrants under their hand and official seal in general terms, *requiring the treasurer to collect the taxes* therein levied according to law; and no informality in the foregoing requirements shall render any proceedings for the collection of taxes illegal. The County Clerk shall take the receipt of the County Treasurer on delivering to him the duplicate tax list with the warrant of the County Commissioners attached, and *such list shall be full and sufficient authority for the collection by the treasurer of all taxes therein contained.*"

Compiled Laws of Dakota, § 1596; Political Code, Sec. 40, Ch. 28.

There is no pretense that the treasurer failed in the performance of any of his duties; but the whole failure, if any, was the mistake or wrongful act of the assessor or of other officers who furnished the list referred to in the above statute.

See on the point that it was not the mistake of the treasurer,

Buck vs. Colbath, 3 Wall., 334.

If the theory of plaintiff in error were correct, then this action might have been brought directly against the treasurer of the county, and plaintiff might have recovered from him the large sum for which judgment was rendered against the county, including the highly penal rate of 30% interest, and all this while the treasurer had only performed his duty under the express

requirement and authority of law, and was in no way responsible for the mistake or wrongful act, if any, in assessing the lands for taxation.

Further than this, if the appellees should succeed in this appeal the county can by the like reason of the statute, recover the amount of the judgment herein against the treasurer.

See, further, on this point, the able discussion by the Supreme Court of the State of North Dakota in its opinion in this case, 48 N. W. Rep., 232, 235; reprinted in the Record in this case, pp. 22–38.

For these reasons this writ of error should be dismissed or the judgment affirmed with costs.

JOHN F. DILLON,
HARRY HUBBARD,
For Defendant in Error.

APPENDIX.

I, George E. Nichols, Treasurer of Cass County, State of North Dakota, do hereby certify that the following is a true copy of the records of my office as to the sale for taxes of the following described lands, for the taxes of the year 1884, and of the redemption of the same.

The S. ½ of S. W. ¼ and S. ½ of S. E. ¼ and N. E. ¼ of S. E. ¼ of Section 35, Twp. 140, Range 52, was sold October 6th, 1885, for the taxes of 1884 to R. S. Tyler, for the sum of $257.34, and on the 16th day of December, 1887, the same lands described above were redeemed by Cass County from said sale. The amount paid by said Cass County on account of such redemption being $325.11, which amount was paid to and receipted for by said R. S. Tyler, on the 16th day of December, 1887.

The N. ½ of S. W. ¼ and S. W. ¼ of N. W. ¼ of Section 33, Twp. 137, Range 50, was sold October 6th, 1885, for the taxes of 1884, to G. T. Thomas, for the sum of $20.41, and on the 1st day of October, 1886, the same lands were redeemed by Gullick Olson from said sale. The amount paid by said Gullick Olson on account of such redemption being $26.43, which amount was paid to and receipted for by R. S. Tyler, on the 3d day of November, 1886.

The W. of ½ Section 25, Twp. 138, Range 50, was sold October 6th, 1885, for the taxes of 1884, to R. S. Tyler, for the sum of $58.14. On the 28th day of October, 1885, the undivided ½ of the N. W. ¼ and the undivided ½ of the W. ½ of the S. W. ¼ of Section 25, Twp. 138, Range 50, was redeemed by J. S. Huntington, from said sale. The amount paid by said Huntington on account of such redemption

being $22.11, which amount was paid to and receipted for by said R. S. Tyler on the 22d day of December, 1885.

On the 24th day of January, 1887, the E. ½ of S. W. ¼ of Section 25, Twp. 138, Range 50, was redeemed by K. Knutson from said sale of October 6th, 1885. The amount paid by said K. Knutson on account of such redemption being $15.13, which amount was paid to and receipted for by said R. S. Tyler February 2d, 1887.

On the 5th day of September, 1887, the undivided ½ of N. W. ¼, and the undivided ½ of W. ½ of S. W. ¼ of Section 25, Twp. 138, Range 50, was redeemed by C. W. Darling from said sale of October 6th, 1885. The amount paid by said C. W. Darling on account of such redemption being $34.31, which amount was paid to and receipted for by said R. S. Tyler on the 6th day of October, 1887.

All of Section 29, Township 143, Range 55, was sold October 7th, 1885, for the taxes of 1884, to R. S. Tyler, for the sum of $123.89, and on the 16th day of December, 1887, the same land was redeemed by Cass County from said sale. The amount paid by said Cass County on account of such redemption being $156.51, which amount was paid to and receipted for by said R. S. Tyler on the 16th day of December, 1887.

All of Section 31, Twp. 141, Range 54, was sold October 7th, 1885, for the taxes of 1884, to C. L. Bradley, for the sum of $64.01, and on the 27th day of April, 1887, the same land was redeemed by Oaks & McEldowney from said sale. The amount paid by said Oaks & McEldowney on account of such redemption being $94.01, which amount was paid to and receipted for by said C. L. Bradley on the 9th day of May, 1887.

(Signed) GEORGE E. NICHOLS,
Treasurer of Cass County, North Dakota,
By W. C. MACFADDEN,
Deputy.

STATE OF NORTH DAKOTA, }
County of Cass, } ss. :

W. C. MACFADDEN, being first duly sworn, on oath says that George E. Nichols is the duly elected and legally qualified Treasurer of Cass County, State of North Dakota, and that he the said W. C. Macfadden is the duly appointed and legally qualified Deputy Treasurer of said County and State; that the foregoing is a true and correct copy of the records of the sale and redemption of the lands therein described, as to the Taxes of the year 1884 as taken from the books of the Treasurer of said Cass County; and that he subscribed the name of said George E. Nichols as Treasurer thereto and his own name as Deputy.

(Signed) W. C. MACFADDEN.

Subscribed and sworn to }
before me this 24th }
day of July, 1891. }

(Signed) L. W. SCHRUTH,
Clerk of District Court,
Cass County, N. D.,
By G. H. PHELPS,
Deputy.

[SEAL.]